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PLEADING UNDER THE NEW YORK CODE OF PROCEDURE.

THE Code of Procedure adopted by the State of New York, in 1848, was undoubtedly the greatest innovation upon the common law which was ever effected by a single statute. In one section it struck out of existence all of that law which was inconsistent with the doctrines of equity, and in another obliterated the whole of the two systems of pleading at law and in equity, replacing both by a single and homogeneous body of rules.

So radical a change amazed, and for a while confounded, the entire legal profession. They were unprepared for it, and unwilling to believe even that it had been accomplished. Down to this very day, there are many lawyers at the bar of New York, and perhaps one or two judges on the bench, who do not yet believe it. They admit that the Code has been enacted, but deny that it means that which it most explicitly says.

The early reports of decisions under the Code testify abundantly to the dire confusion which it created, and the bitter opposition which it met, among both judges and lawyers. For some years it was judicially repealed in a large part of the State, so far as its two main features, before mentioned, were concerned. The good sense of the Court of Appeals (the court of last resort) finally saved it from a fate worse than destruction. We say worse, because it is better that a statute should be repealed outright, than that it should be adjudged to mean the exact reverse of that which its text declares, and its authors intended.

The Code of Procedure stands, and will stand. It has been adopted unreservedly by at least ten States, and by all the new territories, and has, except in regard to the fusion of law and equity, been adopted in some other States, and remoulded the practice of even conservative England, and all her colonies. Never was any single act of legislation, since the Code Napoleon, crowned with such a remarkable triumph. *Never* was such a triumph achieved in law by the mere force of example, against such bitter

opposition. Never was so great a victory so little recognized by the world.

Our present object is not however to give a history of the Code, but simply, for the purpose of meeting the objection, almost universally raised by lawyers practising under the old systems, that the Code has ruined the science of pleading, to give a general view of the present state of that branch of the law, as reconstructed on the new foundations. We think it can be shown that there *is* a science of pleading under the Code, not so abstruse and technical as that of the common law, but far more logical and harmonious.

The object of pleading is now, as it was heretofore, to present to the court the precise question really in controversy between the parties. Experience has shown that any attempt to compel the parties *invariably* to conform to extreme precision on this point, wastes too much time, and is after all nugatory in some cases. The Code therefore adopts a middle rule, as the common law did, though with the important difference that the rule of the Code is general, and that of the common law arbitrary.

The pleadings consist of a complaint and answer, and, if the answer sets up a cross demand, but not otherwise, a reply thereto. Here an issue is joined. If the answer sets up a mere avoidance, the law raises a "general issue," under which the plaintiff may prove any pertinent reply without pleading it.[1]

Errors in the substance of pleadings are submitted to the court by a demurrer. Errors in form are corrected only on motion.[2] If a pleading is not sufficiently precise in its statements, it may be ordered to be made more definite;[3] if it is crowded with superfluous matter, such matter may be expunged;[4] if a defence is false, and known to the pleader to be so, it may be wholly stricken out;[5] if it is wholly frivolous, judgment may be rendered summarily upon it.[6]

All the forms of pleading existing prior to the Code were abolished by it, and the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of such pleadings is to be determined, are those prescribed by the Code.[7] And though forms expressly authorized by statute are held to be saved,[8] yet

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[1] Code, § 168.
[2] Prindle *v.* Caruthers, 15 N. Y. 425: People *v.* Ryder, 12 N. Y. [2 Kern.] 433.
[3] Code, § 160.
[4] Ib.
[5] Code, § 152.
[6] Code, § 247.
[7] Code, § 140.
[8] Code, § 471; People *v.* Bennett, sp. t. 5 Abb. Pr. 384, aff'd 6 id. 343; People *v.* Muller, sp. t. 6 Abb. Pr. 344, note; see Bank of Genesee *v.* Patchin Bank, 13 N. Y., 314.

that is only so far as they are not inconsistent with the Code,[1] and in so far as they contain fictitious averments, they are plainly inconsistent with it, and are not binding, if even allowable.[2]

There is no such reservation as to the common law forms of pleading. Those are absolutely done away, and if used at all, are admissible only upon the same footing as any other pleading of the newest design. Their antiquity gives them no authority under the Code.[3]

The system of pleading introduced by the Code is absolutely uniform in its application to actions of every description, whether legal or equitable. There is no difference recognized by the Code between these classes of actions, so far as pleadings are concerned, and the same rules are to be applied indiscriminately to every action, whether heretofore called an action at law, or a suit in equity.[4] This doctrine is now firmly settled, but not until after a long and severe contest in the courts; and many cases will be found in the earlier reports to the contrary.

Passing over purely formal requirements, the present rules of pleading may be enumerated as follows:

Rule 1. Facts only are to be pleaded.

Rule 2. All facts necessary to sustain the action or defence must be pleaded.

Rule 3. No other facts are to be pleaded.

Rule 4. Nothing need be pleaded which will be presumed or implied.

Rule 5. Pleadings must make the precise nature of the claim or defence apparent.

Rule 6. Pleadings must be concise and without repetition.

Rule 7. Pleadings are to be liberally construed.

To these rules there are certain exceptions allowed.

RULE I.

FACTS ONLY ARE TO BE PLEADED.

It was a professed rule of the common law that all pleadings must be true;[5] but this salutary rule was so overlaid with technical

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[1] Code, § 471.

[2] Ensign *v.* Sherman, 14 How. Pr. 439.

[3] See White *v.* Joy, 13 N. Y. [3 Kern.] 90; Allen *v.* Smillie, sp. t. 1 Abb. Pr. 357; Eno *v.* Woodworth, 4 N. Y. [4 Comst.] 253; Blanchard *v.* Strait, sp. t. 8 How. Pr. 86; Woods *v.* Anthony, sp. t. 9 How. Pr. 78.

[4] Williams *v.* Hayes, sp. t. 5 How. Pr. 470; Millikin *v.* Cary, sp. t. id. 272; see People *v.* Ryder, 12 N. Y. [2 Kern.] 438; Cole *v.* Reynolds, 18 N. Y. 74; Barlow *v.* Scott, 24 N. Y. 40; N. Y. Ice Company *v.* North Western Insurance Company, 23 N. Y. 357; Emery *v.* Pease, 20 N. Y. 62; Phillips *v.* Gorham, 17 N. Y. 270; New York Central Insurance Company *v.* National Protection Insurance Company, 14 N. Y. 85; Crary *v.* Goodman, 12 N. Y. [2 Kern.] 266; Dobson *v.* Pearce, id. 156; Giles *v.* Lyon, 4 N. Y. [4 Comst.] 600.

[5] Slade *v.* Drake, Hob. 295.

exceptions and artificial interpretations as to make it practically a nullity. The Code has restored it under the new system to its proper position of absolute supremacy. All pleadings ought now to be literally and absolutely true.[1] No legal fictions are to be pleaded in any case, whether derived from common law, or from statutes antecedent to the Code.[2]

From these considerations it follows that

FACTS ARE TO BE STATED AS THEY ACTUALLY EXIST,

rather than according to their legal effect.[3]

Facts *may* nevertheless be stated according to their legal effect, provided that when so stated, the pleading remains substantially true,[4] but not otherwise.[5]

The consequence of pleading facts according to their legal effect will be to put the pleader at the discretion of the court in regard to the terms upon which evidence will be admitted under such allegations. If there is no misleading variance between the pleading and the proof, no terms will be imposed, but if there is, as there often must be, the pleader in fault may be compelled to amend and pay costs.

It becomes essential to determine

WHAT ARE FACTS.

Facts are to be carefully distinguished from conclusions of law, arguments, and hypotheses. None of these are allowable in plead-

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[1] See People v. McCumber, 18 N. Y. 323; Bush v. Prosser, 11 N. Y. [1 Kern.] 352; Walker v. Hewitt, 11 How. Pr. 395; Dunning v. Thomas, sp. t. id. 281; Lackey v. Vanderbilt, sp. t. 10 How. Pr. 161; Manning v. Whitbeck, sp. t. cited 1 Monell Pr. 470.

[2] Ensign v. Sherman, 14 How. Pr. 439; see Dias v. Short, 16 How. Pr. 322; Jordan & Sken. Plankroad Co. v. Morley, 23 N. Y. 552; Farron v. Sherwood, 17 N. Y. 227; Dows v. Hotchkiss, sp. t. 10 N. Y. Leg. Obs. 285.

[3] Jordan & Sken. Plankroad Co. v. Morley, 22 N. Y. 552; Farron v. Sherwood, 17 N. Y. 227, 230; Smith v. Leland, 2 Duer, 497, 509; Lee v. Ainslie, 4 Abb. Pr. 467; 1 Hilt. 277; St. John v. Griffith, sp. t. 1 Abb. Pr. 39; Dows v. Hotchkiss, sp. t. 10 N. Y. Leg. Obs. 285; Ives v. Humphreys, 1 E. D. Smith, 201; Glenny v. Hitchins, sp. t. 4 How. Pr. 98; see Buffalo & N. Y. R. R. Co. v. Dudley, 14 N. Y. 343; Cropsey v. Sweeney, 7 Abb. Pr. 131; 27 Barb. 312. The cases in which it was held that facts must be stated according to their legal effect (Hall v. Southmayd, sp. t. 15 Barb. 32; Pattison v. Taylor, sp. t. 8 Barb. 250; Code Rep. N. S. 175; Dollner v. Gibson, sp. t. 3 Code Rep. 153), were erroneously decided on that point, and the case of Dollner v. Gibson was reversed, March, 1852.

[4] Bennett v. Judson, 21 N. Y. 238; N. Y. Cen. Ins. Co. v. Nat. Prot. Ins. Co. 14 N. Y. 85; rev'g S. C. 20 Barb. 468; Stewart v. Travis, sp. t. 10 How. Pr. 153; Rogers v. Verona, 1 Bosw. 419; see Oneida Bank v. Ontario Bank, 21 N. Y. 502; Hoyt v. Thompson, 19 N. Y. 219.

[5] Gasper v. Adams, 28 Barb. 441.

ing.[1] Facts within the meaning of the Code are in general actual occurrences,—physical facts, capable of demonstration by evidence without any reference to municipal law, and from which the court can draw the legal conclusions necessary to sustain the pleader's case.[2] Thus, if A borrow money of B, the borrowing is a fact, and the nonpayment is a fact, but the consequent inferences that B *owes* A the money, and that A is *entitled* to have it, are conclusions of law, and not actual facts,[3] which it is useless to plead.

CONCLUSIONS OF LAW.

Facts are plainly distinguishable from conclusions of law. Legal conclusions or inferences are therefore not to be pleaded, but the facts from which they are drawn must alone be stated. If the former are stated without the latter, the pleading is vitally defective,[4] while if the facts are properly stated the legal inferences derivable therefrom are wholly superfluous in a pleading.[5]

The rule excluding conclusions of law is not, however, to be enforced too rigidly. Mixed allegations of law and fact are frequently allowed, sometimes to avoid prolixity, and in other cases, because such allegations are quite as much in harmony with the ordinary usages of speech, and as readily understood as the pure facts upon which they are based.[6] And, in general, such allegations, even when objectionable in form, are not absolutely nullities, and are good on demurrer.[7]

ARGUMENTS

are not facts, and therefore pleadings must not contain arguments.[8]

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[1] Boyce *v.* Brown, 7 Barb. 85.

[2] Lawrence *v.* Wright, 2 Duer, 673; see Drake *v.* Cockcroft, 4 E. D. Smith, 34; 1 Abb. Pr. 203.

[3] See Drake *v.* Cockcroft, 4 E. D. Smith, 34; 1 Abb. Pr. 203.

[4] McKyring *v.* Bull, 16 N. Y. 297, 303; People *v.* McCumber, 15 How. Pr. 186; aff'd, 18 N. Y. 315; City of Buffalo *v.* Holloway, 7 N. Y. [3 Seld.] 493; Merritt *v.* Millard, 5 Bosw. 625; Lienan *v.* Lincoln, 2 Duer, 670; Schenck *v.* Naylor, 2 Duer, 675; Casey *v.* Mann, sp. t. 5 Abb. Pr. 91; S. C. 14 How. Pr. 163; Van Schaick *v.* Winne, 16 Barb. 89.

[5] Niblo *v.* Harrison, sp. t. 7 Abb. Pr. 452; Lawrence *v.* Wright, 2 Duer, 673; Seymour *v.* Maddox, 16 Q. B. 330; see Jones *v.* Phœnix Bank, 8 N. Y. [4 Seld.] 235; Connecticut Bank *v.* Smith, sp. t. 9 Abb. Pr. 168; Haight *v.* Child, 34 Barb. 186; Durant *v.* Gardner, sp. t. 10 Abb. Pr. 447.

[6] See Decker *v.* Matthews, 12 N. Y. [2 Kern.] 324; Ensign *v.* Sherman, 14 How. Pr. 439; Walter *v.* Lockwood, 23 Barb. 228; 4 Abb. Pr. 307; Cady *v.* Allen, 22 Barb. 395; Woodbury *v.* Sackrider, 2 Abb. Pr. 405; Davis *v.* Hoppock, 6 Duer, 256; Hayden *v.* Palmer, 24 Wend. 364.

[7] See Brown *v.* Richardson, 20 N. Y. 472; People *v.* Ryder, 12 N. Y. [2 Kern.] 433.

[8] Gould *v.* Williams, sp. t. 9 How. Pr. 51.

Nor should the facts be averred in an argumentative form, but they should be directly asserted.[1]

A pleading is not, however, demurrable on this ground,[2] and facts argumentatively pleaded, may be proved on the trial.[3] The proper remedy against such errors is by motion under § 160 of the Code.[4]

HYPOTHESES

are not facts, and therefore pleadings should not usually be in a hypothetical or alternative form.[5] A fault in this respect is, however, no ground for demurrer. The remedy is by motion to make the pleading more definite. And in peculiar cases, where this form of pleading is used in good faith and from necessity, it is allowed.[6]

RULE II.

ALL FACTS NECESSARY TO SUSTAIN THE ACTION OR DEFENCE MUST BE PLEADED.

Every fact which, at common law or in equity, was necessary to sustain the pleader's case, must be alleged in his pleading.[7] And if the action or defence is founded upon a right given by statute, the pleading must state all the facts required to bring the case within the statute;[8] but it is not necessary, in an action upon a right given by the common law, but restricted by statute, to allege in pleading the facts which show that the pleader's right is valid notwithstanding the statute.[9]

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[1] Lewis *v.* Kendall, sp. t. 6 How. Pr. 59, 66; Lipe *v.* Becker, 1 Denio, 568; Sloan *v.* Little, 3 Paige, 116; McKeon *v.* Lane, 1 Hall, 319; see Hunter *v.* Powell, 15 How. Pr. 221; Arthur *v.* Brooks, 14 Barb. 536; Boyce *v.* Brown, 7 Barb. 85; 3 How. Pr. 394; Garrison *v.* Clark, 11 Ind. 371; Hood *v.* Inman, 4 Johns. Ch. 440.

[2] Prindle *v.* Caruthers, 15 N. Y. 425; Spencer *v.* Southwick, 9 Johns. 314.

[3] Brown *v.* Richardson, 20 N. Y. 472.

[4] Prindle *v.* Caruthers; Brown *v.* Richardson, *supra.*

[5] Hunter *v.* Powell, 15 How. Pr. 221; Hamilton *v.* Hough, sp. t. 13 How. Pr. 14; Lewis *v.* Acker, 11 How. Pr. 163; Corbin *v.* George, sp. t. 2 Abb. Pr. 465; Sayles *v.* Wooden, sp. t. 6 How. Pr. 84; Lewis *v.* Kendall, sp. t. 6 How. Pr. 59; Wise *v.* Fanning, sp. t. 9 How. Pr. 543; Porter *v.* McCreedy, sp. t. Code R. N. S. 88; McMurray *v.* Gifford, sp. t. 5 How. Pr. 14; Boyce *v.* Brown, 7 Barb. 80; 3 How. Pr. 391; see Dovan *v.* Dinsmore, 33 Barb. 36; 20 How. Pr. 503.

[6] See Dovan *v.* Dinsmore, 33 Barb. 36; 20 How. Pr. 503; Brown *v.* Ryckman, sp. t. 12 How. Pr. 313; Van Rensselaer *v.* Layman, sp. t. 10 How. Pr. 505; Ketchum *v.* Zerega, 1 E. D. Smith, 553.

[7] McKyring *v.* Bull, 16 N. Y. 297; Prindle *v.* Caruthers, 15 N. Y. 425; Allen *v.* Patterson, 7 N. Y. [3 Seld.] 476; Freeman *v.* Fulton Ins. Co. 14 Abb. Pr. 398; Rodi *v.* Rutgers Ins. Co. 6 Bosw. 23; Bank of U. S. *v.* Smith, 11 Wheat. 174; Texier *v.* Gouin, 5 Duer, 389; Safford *v.* Drew, 3 Duer, 632; Smith *v.* Leland, 2 Duer, 497; McMillan *v.* Saratoga R. R. Co. 20 Barb. 455.

[8] Brown *v.* Harmon, 21 Barb. 508.

[9] Hilliard *v.* Austin, 17 Barb. 141; Washburn *v.* Franklin, sp. t. 7 Abb. Pr. 8; 28 Barb. 27; Stern *v.* Drinker, 2 E. D. Smith, 406; Dewey *v.* Hoag, sp. t. 15 Barb. 365; overruling in effect Thurman *v.* Stevens, 2 Duer, 609. See Horner *v.* Wood, 23 N. Y. 350; aff'g S. C. 15 Barb. 371.

Not only will a demurrer lie, where enough facts are not stated to constitute a cause of action or a defence, but nothing can be proved on the trial that is not alleged in the pleadings;[1] and if such matters should incidentally appear by the evidence, they will be disregarded.[2]

But evidence may be given of a fact vaguely and defectively pleaded,[3] and it is within the discretion of the court to receive evidence of a fact not pleaded, and to treat the pleading as amended by an insertion of such an allegation.[4] Where the fact admitted is but one of a chain of circumstances, of which the rest are stated, it is the duty of the court to admit evidence of such fact, and to conform the pleadings thereto, even though the defect is one that would have been fatal on demurrer.[5]

This rule is of course to be taken as applying only to facts which the pleader has a legitimate opportunity to set up. Facts in avoidance of an answer not containing a counterclaim, or of a reply, may be proved without being pleaded.[6]

The justice of this rule, as administered under the limitations above stated, is unquestionable. If pleadings are to be used at all, they must be required to state all the essential facts of the case, or they become mere traps for the unwary. The rule must be maintained in its integrity, even where its violation does not absolutely mislead the adverse party. But on the other hand, it is after all a mere rule of legal proceeding, and should not be so enforced as to deprive one who transgresses it, of his substantial rights. Where, therefore, both parties go to trial without objecting to the pleadings, it is just that the court should overlook minor defects which could have been pointed out before, and permit amendments on reasonable terms, to obviate even serious errors, lest a controversy concerning more important rights should be determined purely upon questions of the proper method of legal proceeding.

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[1] McKyring *v.* Bull, 16 N. Y. 297; Kissam *v.* Roberts, 6 Bosw. 154; Texier *v.* Gouin, 5 Duer, 389; Pier *v.* Finch, 29 Barb. 170; Beatty *v.* Swarthout, 32 Barb. 293; Bucknam *v.* Brett, 13 Abb. Pr. 119; Bristol *v.* Penn. R. R. Co. 9 Barb. 159; Ford *v.* Sampson, 30 Barb. 183; 8 Abb. Pr. 332; Marion R. R. Co. *v.* Ward, 9 Ind. 126; Garvey *v.* Fowler, 4 Sandf. 665; Mulhollin *v.* Jones, 7 Ind. 716.

[2] Brazill *v.* Isham, 12 N. Y. [2 Kern.] 17; Robbins *v.* Richardson, 2 Bosw. 255; see Field *v.* Mayor, &c., of N. Y. 6 N. Y. [2 Seld.] 189.

[3] Brown *v.* Richardson, 20 N. Y. 472; S. C. 1 Bosw. 405; N. Y. Central Ins. Co. *v.* Nat. Pro. Ins. Co. 14 N. Y. 85; rev'g S. C. 20 Barb. 468; Seeley *v.* Engell, 13 N. Y. [3 Kern.] 548, rev'g S. C. 17 Barb. 530; Currie *v.* Cowles, 6 Bosw. 452.

[4] Lounsbury *v.* Purdy, 18 N. Y. 515; see Cardell *v.* McNeil, 21 N. Y. 336; Bennett *v.* Judson, id. 238.

[5] White *v.* Spencer, 11 N. Y. 247.

[6] Code, § 168.

RULE III.

NO OTHER FACTS NEED BE PLEADED.

Nothing need be alleged in a pleading which is not necessary to be proved at the trial.[1] It has been commonly supposed that certain negative allegations, such as the non-payment of a debt, must be pleaded, although not necessary to be proved. But even the allegation of non-payment appears to be in strictness unnecessary,[2] though usually inserted as a matter of course.

None but material and issuable facts may be pleaded,[3] except in certain cases where additional facts are necessary to be stated for the purpose of giving the adverse party fair notice of the nature of the evidence which he will have to meet. These exceptions will be stated hereafter.

And though a pleading may state any facts bearing upon the final judgment in the action,[4] it need not[5] and must not[6] contain any allegations which affect only the right of a party to a provisional remedy.

EVIDENCE NOT TO BE PLEADED.

The material facts only, and not the circumstances which tend to prove those facts, are to be pleaded. Evidence is to be reserved for the trial and not spread upon the record.[7]

Facts from which another fact material to the issue is to be inferred ought not to be pleaded. This is the substance of the rule against pleading evidence.[8] A statement of facts, tending to prove the ultimate fact upon which the claim or defence is founded, and which, if submitted to a jury, might justify a verdict for the pleader,

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[1] Decker *v.* Mathews, 12 N. Y. [2 Kern.] 320; Ensign *v.* Sherman, 14 How. Pr. 439; Shoe and Leather Bank *v.* Brown, sp. t. 9 Abb. Pr. 220; Hunt *v.* Hudson River Insurance Company, 2 Duer, 487; Union Ins. Co. *v.* Osgood, 1 Duer, 707; Bank of U. S. *v.* Smith, 11 Wheat. 174; Fowler *v.* N. Y. Indemnity Insurance Company, 23 Barb. 143.

[2] See Lanning *v.* Carpenter, 20 N. Y. 447, 458; McKyring *v.* Bull, 16 N. Y. 297.

[3] Mann *v.* Morewood, 5 Sandf. 557; Rensselaer & Wash. R. R. Co. *v.* Wetsel, sp. t. 6 How. Pr. 68; Williams *v.* Hayes, sp. t. 5 How. Pr. 470.

[4] Howard *v.* Tiffany, 3 Sandf. 695.

[5] Corwin *v.* Freeland, 6 N. Y. [2 Seld.] 560; rev'g S. C. 6 How. Pr. 241; Cheney *v.* Garbutt, sp. t. 5 How. Pr. 467.

[6] Lee *v.* Elias, 3 Sandf. 737; Sellar *v.* Sage, sp. t. 13 How. Pr. 231; Field *v.* Morse, sp. t. 8 How. Pr. 47; Putnam *v.* Putnam, sp. t. 2 Code Rep. 64.

[7] People *v.* Ryder, 12 N. Y. [2 Kern.] 438; Allen *v.* Patterson, 7 N. Y. [3 Seld.] 476; Hyatt *v.* McMahon, 25 Barb. 465; Hatch *v.* Peet, 23 Barb. 582; Walter *v.* Lockwood, 23 Barb. 228; 4 Abb. Pr. 307; Boyce *v.* Brown, 7 Barb. 80; Smith *v.* Brown, 17 Barb. 431: Eddy *v.* Beach, sp. t. 7 Abb. Pr. 17; Wooden *v.* Strew, sp. t. 10 How. Pr. 48; Graham *v.* Stone, sp. t. 6 How. Pr. 15; Williams *v.* Hayes, sp. t. 5 How. Pr. 470.

[8] Sanderson *v.* Collman, 4 Man. & Gr. 221.

may often, nevertheless, be wholly insufficient as a pleading,[1] for a pleading must contain such averments that the law alone, without the aid of a jury, can infer that the pleader is entitled to the relief he asks.[2]

ANTICIPATING DEFENCE.

It is not necessary,[3] nor in general proper,[4] to anticipate and avoid the plea of an adverse party. Thus it has been held, that the defence of the statute of limitations cannot be avoided by anticipation;[5] and in an action for negligence it is not necessary to aver that the plaintiff was free from negligence,[6] nor in suing upon a thing in action is it necessary to aver that the plaintiff has not parted with it since he acquired it.[7]

But in some cases a complaint has been allowed to anticipate and avoid the defence;[8] and we think that, under the Code, the plaintiff has a right to do so, notwithstanding the decision to the contrary in *Sands* v. *St. John*, cited below.

It is unquestionably allowable to anticipate and *admit* a defence, and where a partial defence exists it is highly advisable to do so in order to avoid the delay incident to an answer setting up the fact. Thus a partial payment may be admitted, and when it is known to be the only defence, it is much the better plan to admit it in the complaint.

RULE IV.

NOTHING NEED BE PLEADED WHICH IS PRESUMED OR IMPLIED.

Under this rule, there are naturally three subdivisions, viz.: 1. Matters implied; 2. Matters presumed; 3. Matters judicially noticed.

IMPLICATIONS.

A pleader is not bound to allege anything which is necessarily implied.[9] Thus, an allegation that a party "made" a promissory

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[1] See Emery *v.* Pease, 20 N. Y. 62; Buzzard *v.* Knapp, sp. t. 12 How. Pr. 506; Page *v.* Boyd, 11 How. Pr. 417.

[2] Page *v.* Boyd, *supra.*

[3] Wolfe *v.* Howes, 20 N. Y. 197; Hunt *v.* Hudson River Ins. Co. 2 Duer, 481; Troy Fire Ins. Co. *v.* Carpenter, 4 Wisc. 24; Whetstone *v.* Bowser, 29 Penn. 65.

[4] Sands *v.* St. John, 36 Barb. 628; 23 How. Pr. 140; Butler *v.* Mason, sp. t. 5 Abb. Pr. 40; 16 How. Pr. 546; Clark *v.* Harwood, sp. t. 8 How. Pr. 470.

[5] Sands *v.* St. John, Butler *v.* Mason, *supra.*

[6] Johnson *v.* Hudson River R. R. Co. 20 N. Y. 65; Richards *v.* Westcott, 2 Bosw. 602; Wolfe *v.* Sup'rs of Richmond, 11 Abb. Pr. 270; 19 How. Pr. 370.

[7] Niblo *v.* Harrison, sp. t. 7 Abb. Pr. 447; Van Rensselaer *v.* Bonesteel, 24 Barb. 370; Taylor *v.* Corbiere, sp. t. 8 How. Pr. 385.

[8] Wade *v.* Rusher, 4 Bosw. 537; Brackett *v.* Wilkinson, sp. t. 13 How. Pr. 275; Thompson *v.* Minford, sp. t. 11 How. Pr. 275; see Phillips *v.* Gorham, 17 N. Y. 270.

[9] Hunt *v.* Bennett, 19 N. Y. 176; Prindle *v.* Caruthers, 15 N. Y. 425; Partridge *v.* Badger, 25 Barb. 170; Mechanics' Bk'g Asso. *v.* Spring Val. Shot & Lead Co. id. 420; Lafayette Ins. Co. *v.* Rogers, 30 Barb. 491.

note or bond, implies a delivery,[1] and so does an allegation of *indorsement*,[2] or of *acceptance*.[3] It is on this principle that it is not necessary to state that a contract was made in writing, even though it is of a species required by statute to be so made, for there could in such case be no agreement, legally speaking, unless the agreement was in writing.[4]

All implied allegations may, of course, be made the subject of an issue, in like manner as if they were expressly pleaded.[5]

PRESUMPTIONS.

It is not necessary to allege anything that the law will presume.[6] Thus, it is presumed that a libel is false, inasmuch as every man is presumed to be innocent of criminal or disgraceful acts;[7] and so it is presumed that an act is done in a lawful manner;[8] and therefore such facts need not be averred in pleading.

MATTERS JUDICIALLY NOTICED.

It is unnecessary to state in pleading any matters of which the court will take judicial notice;[9] such as public statutes of the state,[10] or of the United States,[11] or the civil divisions of the state.[12] But the laws of other states of the Union, and of course those of foreign nations, will not be judicially noticed, and must be pleaded as facts,[13] and so must corporation ordinances of cities, even in the state.[14]

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[1] Prindle *v.* Caruthers, 15 N. Y. 425; Peets *v.* Bratt, sp. t. 6 Barb. 662; Lafayette Ins. Co. *v.* Rogers, 30 Barb. 491.

[2] Bank of Lowville *v.* Edwards, sp. t. 11 How. Pr. 216; N. Y. Marbled Iron Works *v.* Smith, 4 Duer, 362; Griswold *v.* Laverty, 12 N. Y. Leg. Obs. 316; 3 Duer, 690; Marston *v.* Allen, 8 Mees. & W. 494.

[3] Churchill *v.* Gardiner, 7 T. R. 596.

[4] Livingston *v.* Smith, 14 How. Pr. 492; Bank of Louisville *v.* Edwards, sp. t. 11 id. 216; Cozine *v.* Graham, 2 Paige, 177.

[5] Prindle *v.* Caruthers, 15 N. Y. 429; Marston *v.* Allen, 8 Mees. & W. 494.

[6] See Hunt *v.* Bennett, 19 N. Y. 173; Van Rensselaer *v.* Bonesteel, 24 Barb. 370.

[7] Hunt *v.* Bennett, *supra*.

[8] Chautauque Bank *v.* Risley, 19 N. Y. 381; Mechanics' Bk'g Asso. *v.* Spring Val. Shot & Lead Co. 25 Barb. 420.

[9] Shaw *v.* Tobias, 3 N. Y. [3 Comst.] 188; Brown *v.* Harmon, 21 Wend. 508; Goelet *v.* Cowdrey, 1 Duer, 132.

[10] Ib.; Yertore *v.* Wiswall, 16 How. Pr. 8; Bayard *v.* Smith, 17 Wend. 90; Carris *v.* Ingalls, 12 Wend. 70; Van Hook *v.* Whitlock, 7 Paige, 373.

[11] Jack *v.* Martin, 12 Wend. 329; aff'd 14 id. 507.

[12] Chapman *v.* Wilber, 6 Hill, 475; People *v.* Breese, 7 Cow. 430.

[13] Ruse *v.* Mutual Benefit Ins. Co. 23 N. Y. 516; Thatcher *v.* Morris, 11 N. Y. [1 Kern.] 439; Monroe *v.* Douglass, 5 N. Y. [1 Seld.] 452.

[14] People *v.* Mayor of N. Y. sp. t. 7 How. Pr. 81; Harker *v.* Mayor of N. Y. 17 Wend. 199.

RULE V.

PLEADINGS MUST MAKE THE PRECISE NATURE OF THE CLAIM OR DEFENCE APPARENT.

Every pleading must be sufficiently definite and certain in its statements to make the precise nature of the charge or defence apparent to the court and to the adverse party.[1] For this purpose several descriptive allegations are required, which, though they cannot be made the subject of an issue, and are not strictly material to the cause of action, are nevertheless necessary to identify the precise claim or defence set up.

TIME.

Thus, the time at which a transaction occurred ought to be stated,[2] although the pleader will not be bound at the trial to prove that the event occurred at the time alleged.[3]

PLACE.

Under the old system of pleading it was also necessary to state the *place* at which any material fact occurred, but this degenerated into a mere form which is entirely obsolete. It is now necessary to state the place at which an event took place, only when without such description the transaction might be difficult to identify. In some cases an averment of place is actually a material issue. Thus, in an action on a contract void by the law of the state, it is material to show that it was made in a state where such contracts are by law valid;[4] and so, in suing under a statute applicable only to occurrences within the state, the complaint must not leave it doubtful whether the transaction did so occur or not;[5] and in pleading performance of an act required to be done at a particular place, the place of performance must be alleged.[6]

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[1] Code, § 160.

[2] Chesbrough *v.* N. Y. & Erie R. R. Co. sp. t. 26 Barb. 9; 13 How. Pr. 557; Blanchard *v.* Strait, sp. t. 8 How. Pr. 83.

[3] Lester *v.* Jewett, 11 N. Y. [1 Kern.] 460; Lyon *v.* Clark, 8 N. Y. [4 Seld.] 157; Potter *v.* Thompson, 22 Barb. 89; Walden *v.* Crafts, 2 Abb. Pr. 302; S. C. 4 E. D. Smith, 490; Hovey *v.* Amer. Mut. Ins. Co. 2 Duer, 567; Amory *v.* McGregor, 12 Johns. 288.

[4] Thatcher *v.* Morris, 11 N. Y. [1 Kern.] 440.

[5] Beach *v.* Bay State Co. 10 Abb. Pr. 71; 30 Barb. 433; 6 Abb. Pr. 415.

[6] Ferner *v.* Williams, 14 Abb. Pr. 215; U. S. Bank *v.* Smith, 11 Wheat. 171; Saul *v.* Jones, 1 El. and El. 59; see Clark *v.* Dales, 20 Barb. 42.

QUANTITY.

In regard to averments of quantity and amounts, the only test to be applied is — Are such averments, in the particular case in hand, necessary to make the pleading specific?

VALUE.

In general, some statement of the value of a thing in controversy is proper, as a matter of description, in all actions brought for the recovery of money. But, except in an action on contract for the recovery of the reasonable price of a thing,[1] averments of value are not issuable.[2]

LESS PARTICULARITY IS REQUIRED CONCERNING FACTS KNOWN TO THE ADVERSE PARTY.

This was an established rule under the old system of pleading,[3] and it is so clearly reasonable that its validity under the new system cannot be doubted. It is sustained by decisions under the Code.[4] Thus, in an action by an executor or administrator it is proper that he should show how he was appointed; but in an action against him, it is unreasonable to require the plaintiff to state the details of a transaction with which the defendant must be necessarily far more familiar.

REMEDY AGAINST VIOLATION OF THE RULE.

The only remedy against a want of precision, and particularity in a pleading, is by motion to make it more definite and certain, under section 160 of the Code. No demurrer will lie upon this ground.[5] For the office of a demurrer is to show that nothing has been alleged which, if proved, could be available to the pleader, and not to raise the objection that the demurrant cannot clearly understand the pleading.

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[1] Gregory *v.* Wright, sp. t. 11 Abb. Pr. 417.

Hackett *v.* Richards, 3 E. D. Smith, 13; Connoss *v.* Meir, 2 E. D. Smith, 315; see Woodruff *v.* Cook, 25 Barb. 510, overruling in effect Archer *v.* Boudinet, sp. t. Code Rep. N. S. 373.

[3] Stephen on Pldg. 370; Van Rensselaer *v.* Jones, 2 Barb. 655; People *v.* Dunlap, 13 Johns. 440; Norton *v.* Vultee, 1 Hall, 385.

[4] See Nellis *v.* De Forest, 16 Barb. 67; Stoddard *v.* Onondaga Conference, 12 Barb. 573; Richards *v.* Edick, sp. t. 17 id. 260; West *v.* Brewster, 1 Duer, 647.

[5] Dagal *v.* Simmons, 23 N. Y. 491; Seeley *v.* Engell, 13 N. Y. [3 Kern.] 542; People *v.* Ryder, 12 N. Y. [2 Kern.] 433; Clark *v.* Dales, 20 Barb. 42; Graham *v.* Cammann, 5 Duer, 697; 13 How. Pr. 360; Farmers' & Citizens' Bank *v.* Sherman, 6 Bosw. 181.

RULE VI.

PLEADINGS MUST BE CONCISE.

All pleadings are required to be concise, and to contain no unnecessary repetition.[1]

CONCISENESS.

Facts should be stated in a simple, though logical form, and in as few words as possible.

For the sake of conciseness, the courts permit a mode of pleading not strictly regular, as for instance, averments of law and fact intermingled, or argumentative allegations, where pure allegations of fact would lead to great prolixity.

Thus in pleading title to real estate,[2] or to goods and chattels,[3] it is sufficient to allege that the pleader is the "owner" thereof. But in pleading title to a thing in action, as a bill or note,[4] or debt,[5] the pleader's title should be concisely traced down from the original owner. The reason of the distinction is obvious. It is always within the power of a pleader to show how the title to a note or a debt was created, while it is rarely possible for him to know who first acquired title to a piece of tangible personal property, and never possible to state the primal source of title to land. The pleader may therefore as well stop at the allegation of ownership in himself, as to go back through a hundred owners, and finally be reduced to a general averment of ownership in somebody else.

The cases we have cited in regard to notes and debts hold the allegation of ownership bad on demurrer. But in this they are erroneous.[6] The fault is merely argumentativeness, and is a ground only for a motion under § 160.[7]

REPETITION NOT ALLOWED.

Pleadings must not repeat the same facts even under a different form. A complaint or counterclaim is not allowed to set forth a

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[1] Code, §§ 142, 149, 153.

[2] Walter *v.* Lockwood, 23 Barb. 228, 4 Abb. Pr. 307; Ensign *v.* Sherman, 14 How. Pr. 439; People *v.* Mayor of N. Y. sp. t. 8 Abb. Pr. 16; Sanders *v.* Leavy, sp. t. 16 How. Pr. 408; overruling Lawrence *v.* Wright, sp. t. 2 Duer, 673.

[3] Davis *v.* Hoppock, 6 Duer, 256.

[4] White *v.* Brown, sp. t. 15 How. Pr. 282; Seeley *v.* Engell, 17 Barb. 530.

[5] Thomas *v.* Desmond, sp. t. 12 How. Pr. 321; Adams *v.* Holley, sp. t. id. 330.

[6] Prindle *v.* Caruthers, 15 N. Y. 431; Brown *v.* Richardson, 20 N. Y. 472; Holstein *v.* Rice, sp. t. 15 How. Pr. 1; Taylor *v.* Corbiere, sp. t. 8 How. Pr. 385; Bank of Geneva *v.* Gulick, sp. t. id. 54.

[7] Prindle *v.* Caruthers, Brown *v.* Richardson, *supra.*

single cause of action in several counts.[1] The cases are uniformly to the same effect, except in two instances,[2] where, on account of peculiar circumstances, which made it difficult for the plaintiffs to rely upon a single form of statement, double counts were allowed. These last decisions were, however, erroneous. It is impossible that such a form of pleading can be true, and it is clearly repetitious. The only legitimate relief that can be afforded to a pleader embarrassed by uncertainty as to his facts, is to allow him to plead in a hypothetical or alternative form. That is sometimes necessary, but two counts upon the same cause of action are never necessary.

RULE VII.

PLEADINGS ARE TO BE LIBERALLY CONSTRUED.

The allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties.[3]

Even on demurrer, pleadings must be liberally construed,[4] and upon an issue of fact being joined, a still more liberal rule of interpretation prevails. By omitting to demur,[5] or to move for a reformation of the pleading,[6] the adverse party waives all defects which he might in that way have pointed out, and virtually admits the sufficiency of the pleading. It will therefore be construed at the trial in favor of the pleader,[7] and its defects, unless absolutely fatal in their character, will be amended or disregarded at the trial.[8]

AMBIGUITY.

But where a pleading is purposely made ambiguous, its allegations will be construed most strongly against the pleader, on demurrer or motion. The cases cited state the rule more broadly, but we think they can be sustained only upon this ground.[10]

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[1] Fern *v.* Vanderbilt, sp. t. 13 Abb. Pr. 72; Nash *v.* McCauley, sp. t. 9 id. 159; Dickens *v.* N. Y. Central R. R. Co. 13 How. Pr. 228; Sipperly *v.* Troy and Boston R. R. Co. 9 id. 83; Ford *v.* Mattice, sp. t. 14 id. 91; Whittier *v.* Bates, sp. t. 2 Abb. Pr. 477: Dunning *v.* Thomas, sp. t. 11 How. Pr. 281; Lackey *v.* Vanderbilt, sp. t. 10 How. Pr. 155; Churchill *v.* Churchill, sp. t. 9 id. 552; Stockbridge Iron Co. *v.* Mellen, sp. t. 5 id. 439.

[2] Birdseye *v.* Smith, 32 Barb. 217; Jones *v.* Palmer, sp. t. 1 Abb. Pr. 442.

[3] Code, § 159.

[4] Keteltas *v.* Myers, 19 N. Y. 231; Allen *v.* Patterson, 7 N. Y. [3 Seld.] 476; Yertore *v.* Wiswall, 16 How. Pr. 8; see People *v.* Ryder, 12 N. Y. [2 Kern.] 433, 439.

[5] White *v.* Spencer, 14 N. Y. [4 Kern.] 247.

[6] Wall *v.* Buffalo Waterworks, 18 N. Y. 119.

[7] Ib.

[8] White *v.* Spencer, 14 N. Y. 247; St. John *v.* Northrup, 23 Barb. 30; Cady *v.* Allen, 22 Barb. 388; see Lounsbury *v.* Purdy, 18 N. Y. 515; Bennett *v.* Judson, 21 N. Y. 238; Bank of Havana *v.* Magee, 20 N. Y. 355.

[9] Beach *v.* Bay State Co. 10 Abb. Pr. 71; 30 Barb. 433; Ridder *v.* Whitlock, sp. t. 12 How. Pr. 208.

[10] Compare Allen *v.* Patterson, 7 N. Y. [3 Seld.] 476.

PLEADINGS TO BE TAKEN TOGETHER.

The whole of a pleading should be taken together, and broad, general statements in one part must be qualified by any more particular averments in another part.[1]

The demand of judgment,[2] and if necessary the summons,[3] may be consulted, for the purpose of ascertaining the nature of the action, where that question is of importance.

We have thus reviewed all the general rules of pleading, but there are to be noted some

EXCEPTIONS TO GENERAL RULES.

In certain cases, for the sake of brevity, the Code waives the strict rules generally applicable to pleadings, and permits a looser form of statement. These exceptions we shall but briefly indicate here, as it is our design in this series of articles to treat fully of those rules only which are common to all codes of procedure.

ACCOUNT.

It is not necessary, in pleading upon an account, to set forth all its items;[4] but the adverse party may, by demand in writing, require a copy of the account to be served upon him within ten days after such demand, and if the complaint is verified, such account must also be verified.[5]

INSTRUMENT FOR PAYMENT OF MONEY ONLY.

In an action or defence founded upon an instrument for the payment of money only, it is sufficient to give a copy thereof, and to state that there is due to the pleader thereon, from the adverse party, a specified sum, which he claims.[6]

CONDITIONS PRECEDENT.

It is not necessary to state the facts showing performance of conditions precedent, but it may be alleged generally that the party

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[1] Hatch *v.* Peet, 23 Barb. 575; Page *v.* Boyd, 11 How. Pr. 415; see per Greene J., Laub *v.* Buckmiller, 17 N. Y. 622.

[2] Rodgers *v.* Rodgers, 11 Barb. 595; Chambers *v.* Lewis, sp. t. 10 Abb. Pr., 206; Dows *v.* Green, sp. t. 3 How. Pr. 377; Spalding *v.* Spalding, sp. t. id. 297.

[3] Sellar *v.* Sage, sp. t. 12 How. Pr. 531; but compare Chambers *v.* Lewis, sp. t. 10 Abb. Pr. 206.

[4] Code, § 158; see Moffet *v.* Sackett, 18 N. Y. 522; Allen *v.* Patterson, 7 N. Y. [3 Seld.] 476; Cudlipp *v.* Whipple, 4 Duer, 610; Chesbrough *v.* N. Y. & Erie R. R. Co. sp. t. 26 Barb. 12; 13 How. Pr. 557.

[5] Code, § 158.

[6] Code, § 162.

pleading duly performed all the conditions on his part.[1] Upon this allegation being denied, the party so pleading must prove, on the trial, the facts constituting a performance.[2]

It is to be observed that this rule does not extend to the pleading of conditions *concurrent*, which are distinct things from conditions precedent.[3] In the English Common Law Procedure Act, special provision has been made for them, but none is made by the Code.

JURISDICTION.

In pleading a judicial determination of any court or officer of special jurisdiction, it is not necessary to allege the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.[4] If this allegation is denied, the facts conferring jurisdiction must be proved.

The jurisdiction of other courts is presumed, and need not of course be alleged.[5]

LIBEL AND SLANDER.

The Code allows mitigating circumstances to be set up as a defence in actions for defamation, with or without a justification.[6]

In a complaint for libel or slander, it is sufficient to aver that the words were published "concerning the plaintiff," without stating extrinsic facts to show their application to him.[7]

TITLE TO LAND.

In an action to recover animals distrained doing damage, the defendant need not set forth his title to the land upon which the distress was made, but it is sufficient to state that he, or the person by whose command he acted, was lawfully possessed of such land, and that the property distrained was at the time doing damage thereon.[8]

CONCLUSION.

The majority of the rules here stated will be recognized by practitioners under the old systems as belonging, at least in name, to one or other of those systems. The strict adherence to truthfulness

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[1] Code, § 162.
[2] Ibid.
[3] See Beecher *v.* Conradt, 13 N. Y. [3 Kern.] 108; Dunham *v.* Mann, 8 N. Y. [4 Seld.] 512.
[4] Code, § 161.
[5] Chemung Canal Bank *v.* Judson, 8 N. Y. [4 Seld.] 254; Cruyt *v.* Phillips, 7 Abb. Pr. 205.
[6] Code, § 165; Bush *v.* Prosser, 11 N. Y. [1 Kern.] 347; Van Benschoten *v.* Yap'e, sp. t. 13 How. Pr. 97.
[7] Code, § 164.
[8] Code § 166.

which the Code requires, was substantially enforced in equity. The exclusion of evidence from pleadings was prescribed at common law. But it would be a shallow judgment to infer from this that the Code was unnecessary, or that it effected no material reform. It was not intended to alter the rules of logic, upon which the legal science of pleading was originally founded, but rather to brush away the cobwebs of mere technicality, which had in the course of ages covered over that science. This it accomplished, and established a single body of rules for the regulation of pleading in all legal controversies, combining the meritorious features of both the old systems, with none of their defects. As finally expounded by the courts, and illustrated by the practice of such of the profession as have taken any pains to conform to its principles, there is no science of pleading more symmetrical than that of which the New York Code of Procedure has laid the foundations. It is true that the entire structure is not completed by the text of the statute—it does not lay down in express words every detail of the plan, and had it done so, it would undoubtedly have been more censured for technicality than it now is for looseness. It was not designed to supersede the necessity of treatises or of judicial expositions, but it was intended to state in a concise form principles from which all needful details could naturally be inferred. This it did, and so successfully that England, pursuing the opposite process of pruning, instead of reconstructing the law, has arrived at exactly the same point; so that a pleading suitable to a common law action in New York would, with a different caption, be perfectly unexceptionable in England, Ireland, and Canada. We by no means desire to set up the judgment of England as a final arbiter, even in matters of law, but considering the excessive conservatism of her ruling classes, no one will deny that their indorsement is sufficient to vindicate the legal reforms of New York from the charge of undue radicalism. Much of the confusion which undoubtedly exists in the practice of that state, is owing to the fact that the legislature has never completed the work of reform, and has left the bench and the bar to patch up a system of practice, as they best might, from an incongruous medley of new and old materials. But pleading, being fortunately freed from such unfavorable conditions, is governed by as judicious and intelligible rules as could well be devised,—the only real difficulties now existing being in the too frequent incompetency and ignorance of pleaders.

ON THE TRIAL OF ISSUES INVOLVING THE CONSIDERATION OF SCIENTIFIC EVIDENCE AND THE EVIDENCE OF EXPERTS. [1]

ALTHOUGH this subject so recently occupied our attention, I cannot help feeling that neither the Society nor any individual members of it can require from me an apology for the continued discussion of so important a question as that which relates to the true position of science and skill in the administration of justice. Much less can I allow myself to believe that the Society could deprecate the use of its time in endeavoring to discover how the different departments of human knowledge may be made subservient to the practical efficiency among the people of the principles of our system of jurisprudence.

And, in truth, this serious question, notwithstanding all the debate and controversy we have had about it, has not yet received its solution. Nor, when we attentively consider the objections that have been made to proposed changes in the existing procedure, can we wonder at the hesitation, so plainly manifested by our profession, to interfere with the present mode of trial which does not exempt skilled knowledge from the ordinary conditions of sworn testimony.

It is, indeed, well that it should be so, and that a right and discriminating conclusion should not be arrived at, on so large and difficult a subject, without reiterated and anxious consideration, and without hastily setting aside a practice, like the present, which, whatever its intrinsic defects, has contrived not only to maintain itself without disrepute, but to have attracted to its support a great and learned experience. Its very detractors (if I may be allowed to use an expression that may appear harsh to the minds of some) have been its disciples; and our learned and able colleague, Mr. Webster, will, I feel assured, not refuse to admit the claims of a procedure in the service of which he has himself accumulated that learning and forensic ability which have made him one of our chief authorities in this delicate branch of legal administration.

But undoubtedly an amendment of the law is here required. What form that amendment may assume, and what may be the weak spot it may discover, I fear we are scarcely yet able to show. Is it that our present mode of trial overlays too much the witness's scientific mind, or the generic quality of the expert's skill, and that nisi prius does not treat these aids to its justice with becoming respect? Or is it that juries take too low a measure of the claims of science, regarding them simply as helps and contributors of those

[1] A Paper by Robert Stuart, Esq., read at a general meeting of the Society for the Amendment of the Law, held on Monday, the 22d of June, 1863. [From The Law Magazine and Law Review, August, 1863.

particulars which are inductively to lead to their verdict? Or is it that the breast of the judge requires to be scientifically instructed and expanded, and that the mind and conscience of the Court itself are judicially wanting in this one great element of its constitution? Or is it that the scientific man should not be a witness at all, but a juror, or it may be a judge? These and such like are among the considerations which must be taken into account. Clear it is that this matter of science, if it be, indeed, a reproach and embarrassment to the Courts, is not too large or difficult for the law; nor was the Roman lawyer mistaken when, with lofty ideas of his calling, he defined jurisprudence to be "divinarum atque humanarum rerum notitia, justi atque injusti scientia."

Perhaps the most useful manner in which, at this period of the controversy, I can re-open the subject is, by briefly reviewing the discussion that has already taken place, and of which we have reliable reports in duly accredited publications. But I beg to be allowed a few preliminary remarks.

When this subject was last before the Society, it appeared to me that it had not been sufficiently considered, more especially with reference to its strictly legal bearings. So far as I could understand, a great deal was said about science, and scientific evidence, and scientific assessors, and a number of speculations were offered, having, as it appeared to me, a mere regard to these particulars. But I could not see how, what was said on these subjects was intended to qualify the one great question, viz., the proper form and order of the trial. I say the *trial*, for, with great deference, what we have chiefly to consider is not a mere matter of science or of scientific evidence; it is a question as to how we are to deal, not only with science strictly so called, but with all kinds of peculiar knowledge and skill when we require their aid for the purpose of determining right and justice between litigants; in other words, it is a question as to how we are to make the knowledge and skill of persons in particular departments of life available in the administration of the law. Science and scientific men, no doubt, come largely and perhaps chiefly under this category, but there are others in the same situation. The evidence of skilled tradesmen, of foreign lawyers, of doctors and surgeons, and, in short, of all who, by profession or calling, or by the accumulation of particular knowledge and experience in any recognized business, have established for themselves a certain reputation, are as much experts as the strictest and the most gifted of scientific men, and entitled to as much consideration. In fact, skilled evidence, that is, the evidence of skilled opinion, whether taken as matter of fact, as in the case of foreign law, or of mere opinion, must, as it appears to me, be all taken in the same way; and what we want, therefore, is not so much to hedge round science and its votaries with any protective

device, but such a procedure at the trial as will best, most justly, and most completely, give effect to the evidence which the parties have adduced, whether that evidence be purely scientific or skilled testimony, or be mixed with other evidence relating to the facts in dispute. This was, I think, the real question for our consideration, and it is a question rather for the legal than for the scientific man.

But now to the former discussion referred to. As the Society is aware, that discussion arose in consequence of the conflicting medical evidence that was given at the trial of Dr. Smethurst for murder, in the autumn of 1859; and it was at first conducted with the greatest violence and acrimony, the newspapers of the day being inundated with letters all more or less distinguished by these ungenial qualities; "*Medicus*," "*Justitia*," "*Lex*," "*Veritas*," "*Scientia*," and various other *nommes de plume*, being the signatures under which the vituperative missives were published. But it does not appear that the lawyers were much excited; they rather seem to have considered that the quarrel having been made by the doctors, these gentlemen had better settle it among themselves. And here I must observe, that, if the matter of *procedure*, on which the discussion is now brought to bear, had been left to be considered with reference to the trial in question, nothing could have been more unjust or more unreasonable than to have preferred any complaint on that score; for, whatever may have been thought of the verdict, the trial itself was, from beginning to end, and with reference to all the evidence, and all the witnesses, a perfectly fair one.

I have heard it said that medical men in general make bad witnesses, and that they generally contrast unfavorably in this respect with soldiers—a remark that may be quite intelligible without any necessary disparagement of our medical friends in the estimation at least of those who are acquainted with their professional idiosyncrasy—an idiosyncrasy which, however intellectual and philosophical, and medical, is just of the kind which, in the interest of the public, is, perhaps all the better for that gentle and particular restraint which legal procedure now and then imposes upon it. The doctors were allowed, however, full play in the newspapers; and if they gradually got less excited, they became more serious and prolix, and the medical periodicals became very learned on the subject of medical and scientific evidence. Whether much light was thus thrown on what we lawyers call *evidence*, I do not suggest, but unquestionably a very great deal of cleverness and ingenuity was exhibited. Of course, there was no difficulty in removing the stage of the question from Smethurst's trial to the general platform of science at large; and one of the most conspicuous essays of the kind to which I alluded, was a paper read before various learned bodies, and in particular before the Society of Arts, on the 18th

January, 1860, Vice-Chancellor Wood being in the chair, by Dr. R. Angus Smith, F.R.S., entitled, "Science in our Courts of Law." The paper was published in the number of the Journal of the Society of Arts for January, 1860, along with a report of the discussions that followed upon it, and it is a very long one. It is divided into numerous heads; and it would be idle for me to attempt to give anything like a *resumé*, however brief, of its actual contents. Nor is it necessary, for, while it suggests a number of important considerations, I cannot say, after a most careful perusal, that it assists us much in discussing the subject of my present remarks; while its more dogmatic statements could be easily proved to be erroneous, even if its peculiar style of composition was more favorable than it is to the communication of dogmatic truth. It is extremely metaphysical—and I had almost said eccentric.

The Society will pardon me if I give one or two illustrations of Dr. Smith's misconception of the subject. He observes:

"We see science moving with irresistible force, gradually seizing more and more of the rights and properties of every subject, and of every government, whilst the scientific man, the expounder of science, has no recognized place, but is allowed to give his evidence as a necessity, and frequently in a manner that might be shown to be as illegal as it is for the time unavoidable."

What the Doctor means, in this very hazy sentence, about "evidence as a necessity," and yet "illegal," albeit "unavoidable," I cannot surmise; but we all know that medical and scientific evidence, which is always highly paid for, must be a necessity where it is judicially required; and that if it is not legal, it is not evidence at all. The Doctor proceeds to observe:

"That physical science is the ultimate referee in cases where it can give a clear answer, and that suitable arrangements should be made for obtaining the unprejudiced opinion of those who have studied it.

"That in all differences of opinion, whether in social or physical law, and in all difficult cases, the instincts of man, in a free country, will take the lead (right or wrong)."

The first of these points of course contains the abstract truth; but the obvious comment is that, as science is impersonal and cannot speak under the circumstances supposed, we must do our best in the witness-box with its human professors; and that in order to obtain that "clear answer," which it, that is science itself, if we could only subpœna it, could give, we must investigate, by examination and cross-examination, these professors' opinions. The

Doctor himself seems to have had something of the same kind of misgiving in his mind, because he shortly afterwards admits that, "science is liable to be expounded by its teachers pedantically and imperfectly," and when he further on declares that "the public must expect a great deal of opposition among scientists." The second point I have quoted above is, I confess, to me not quite intelligible; for what he means by "the instinct of man in a free country taking the lead (right or wrong)," I do not see, unless, "by the instinct of man in a free country," we are to understand him to refer to the *jury*, "and by taking the lead (right or wrong)," to the *verdict*, whether it be correct, or one that "serves him right," which, of course, is generally wrong.

Again, Dr. Smith remarks:

"Even supposing a witness to insist, as some will do, on giving all his fullest evidence, it is scarcely possible to avoid having it distorted by the examining party. One trifling remark may be so examined, and so much questioning may be spent upon it, that it takes the place with the jury and the public of an important point. On the other hand, a most important remark is passed over in silence. Now this destroys the due proportions given to the evidence in the mind of the scientist."

The fallacy in this quotation is transparent. The importance of the witnesses' remarks is, of course, not to be viewed with reference to the matter of science in hand, but with reference to the issue in fact under trial, and to the true answer to which the scientific evidence is intended to lead; and it is only evidence so far as it is introduced by the interrogatories in Court. As to the "due proportion given to the evidence in the mind of the scientist being destroyed," it really matters not whether it be so—the mind of the scientist has nothing to do with the question—it is the mind of justice, and of the law in relation to the question of right before the Court, which is the real consideration.

These and many other illustrations of the same kind, which I could give from this very singular paper, show that Dr. Smith misconceived the nature of evidence, and the legal position of a witness in a court of justice.

His general position appears to be this, that a scientific witness, or a scientific man, or a scientist, as he delights to call him, is not to be controlled by counsel at all; in fact, is not to be examined by them, at least, in the first instance. He, as a scientific man, would ignore the Bar, and hold converse only with the judge, speaking what he likes and when he likes—a mode of proceeding, however, which I fear would make trials, involving the consideration of scientific evidence, very unedifying indeed.

The whole paper, although, as I have said, very clever, very elaborate, and probably very subtle, is, in my humble judgment, a most unsatisfactory exposition, even if its peculiar and rather dreamy phraseology were of a more palpable character than it is. The best part of it is where, towards the end, Dr. Smith speaks of the remedy he proposes: the first point of which relates to the appointment of an assessor, and the second, to the mode in which a scientific witness ought to be examined; but the third is, I think, deserving of serious consideration. It is as follows:

"That scientific men giving evidence on scientific points shall be allowed to deliver their examinations in writing. The reading and elucidation to be controlled by the judge; examination and cross-examination by the barrister to follow."

This proposal was thought so much of by the Rev. Vernon Harcourt (a gentleman who appears to have taken great interest in this subject), that he introduced it into a proposed Parliamentary Bill, which he drew up on the regulation of scientific evidence. He appears to have borrowed the idea from the examination of medical witnesses in Scotch criminal courts. But as I can attest from my own personal experience in these courts, that proceeding is not always attended with complete success. I have a very distinct recollection of being present at an Assize Court in Scotland, when one of the most distinguished surgeons of the present day was examined in the manner explained. He came, of course, with his report on the *Corpus delicti*. It was a very precise and distinct document; and, although he read it very badly, it made a great impression on the Court. Unfortunately, however, for the learned and distinguished professor (for he was a professor), the prisoner's counsel availed himself of the privilege of cross-examining him on his report; and I am really concerned to inform the Society that he succeeded too well in utterly destroying the weight of the professor's evidence, by the contradiction and general mess in which he involved him, and of which, in a spirit of great disrespect, he fully availed himself in the very unreserved observations he afterwards addressed to the jury on the painful subject. I am very much afraid that if the distinguished professor, who is also a very learned and able author, had sat down, immediately after the forensic exhibition I have described, to write an essay on Medical Evidence, he would have written even more sternly and indignantly than Dr. Angus Smith has done. The incident I have related, however, shows the danger of allowing such examinations and cross-examinations without due regulation; and on this subject I shall, before I conclude this paper, make a suggestion as to the control under which nisi prius and Old Bailey advocacy should be placed in any amendment of procedure that may be adopted.

In the discussion which followed the reading of this paper by Dr. Smith, some very interesting and useful remarks appear to have been made by our learned colleague, Mr. Thos. Webster, Dr. Taylor, and others present. Dr. Taylor mentioned a circumstance of great importance, and which it is hoped may be kept in view in any reform which may take place hereafter. He stated:

"That the differences amongst scientific men were rather those of opinion than of fact; and from his own experience, which had been considerable, he knew that facts were often laid before them in such a manner that they had not a half even—if they had a quarter—of the truth of the case. It had occurred to himself upon many trials, both in cases of patent rights, and of murder, involving questions of the greatest importance to society, that, for the first time, he heard in the court facts which would have materially altered his opinion; so that scientific men were entirely at the mercy of those who instructed."

The Chairman, Vice-Chancellor Wood, summed up the discussion, observing that the great difficulty in such evidence was the evidence of opinion, and, in illustration of this, he mentioned,

"That, in a case which came before him, six of the most eminent members of the Scottish Bar gave evidence upon a question of Scottish law—three on one side and three on the other. The question referred to a matter connected with the Free Kirk, and diametrically opposite opinions were given as to what the Scotch law was; the opinion in each case coinciding with the particular religious views of the witness; and yet in this case perfectly honest opinions had been given."

Dr. Smith's paper had, previously to its having been read before the Society of Arts, been communicated to this Society, and I find that at our meeting of the 28th November, 1859, a committee was appointed to consider the subject, and on the 20th February, 1860, the committee's report was read. It will be found on page lx. of the *Law Amendment Journal*. This report in substance recommends that there should be no change in the existing procedure. The committee are against "any change in the existing mode of taking evidence, at least until some plan had been proposed of which the advantages would be clear, and which should work harmoniously with the rest of our legal system;" and they express their opinion that to none of the suggestions by scientific men that had been laid before them did this character apply. Some of these suggestions, they observe, were entirely nugatory, and others opposed to the whole spirit of our jurisprudence, or would introduce an element of

confusion, of which it would be impossible to calculate the result. The report is also against requiring scientific evidence being given in writing, and also against scientific assessors; and the committee wind up by stating they see no reason for making any distinction between civil and criminal cases. As a whole, the report, which appears to have been the last serious expression of opinion by the Society, is distinguished by a candor and lawyerlike discrimination most creditable to its authors; and it is impossible to read it without a feeling of respect for the good sense and sound judgment which evidently guided its preparation; and, for myself, I must say that I very much sympathize with it.

The other medical and scientific gentlemen who have discussed this subject are Professor Christison, of Edinburgh, Dr. Letheby, and the reverend gentleman I have before referred to, the Rev. Vernon Harcourt.

Mr. Webster's paper, read here on the 18th of last month, again brought up the subject before us; and in a leading article of *Newton's London Journal of Arts and Sciences*, published on the 1st of this month, Mr. Webster's views are enforced.

I believe I correctly describe the discussion which has thus taken place by stating that, as it at present stands, it limits the consideration of any change to the proposal to appoint scientific assessors, and, in certain cases, to the modification of the trial by jury. But the controversy so stated involves other elements of consideration, and I shall now submit to the Society the outlines of such a reform as, in my judgment, would meet any difficulty or inconvenience experienced under the existing system of taking this kind of evidence.

We must take care, however, to regard the subject from the true point of view. We shall not do so, if we look at it as a mere question of *evidence*, or even of evidence in relation to *science and skill*. The real and great question is, *how shall the issue be tried?*—for after the evidence has been given, and over and above it, there is the matter, the paramount matter, of *right* and justice, and how shall *that* be determined? The question, then, I say, is, *how shall the issue be tried?* Now this is a lawyer's question, and a lawyer's question exclusively; one to which Doctors of Medicine, and scientists as they are called, and experts in general, have nothing to say. After the discussion we have had, and under all the circumstances in which the question has been raised, it must be held to go to the very constitution of the existing tribunals themselves, and even to exclude the capacity of its highest officials. Are then our judges and juries of the present day, according to the theory of their qualifications, equal to this kind of business? If they are not, then either they themselves individually or the law and practice of their courts are at fault. But if they are, then scientific men and

experts must not, in the capacity of assessors or jurors, invade the bench or jury-box, but must be content to assist the Court by their evidence.

I had occasion to consider this subject many years ago, in Scotland, chiefly with reference to a proposal to have science in such cases represented in the constitution of the jury; but, in my opinion, there is no substantial difference between the cases of jurors and assessors; and the argument equally applies for or against the two positions. The whole question was, I recollect, very anxiously considered, and I explained my views in a statement I communicated to one of the legal publications of the day, on the complaints that were then made in Scotland against the system of trial by jury in civil causes; and among which complaints the system of pleading and the method of deriving and settling issues, held a principal place. As the opinions expressed in the paper referred to are still held by me, perhaps the Society will allow me here to read a few sentences from it:

"The complaints, however, that are sometimes heard in Scotland on this subject, do not argue a clear idea of the juror's office, which they confound with that of the witness. Evidence, especially where it is progressive and in detail, is one thing; the juror's understanding, to which that evidence is addressed, and by which the whole is to be brought to one general result in the suit, is another. Herein lies the error of those who object to juries; not because they are generally uninformed, but in consequence of their wanting in particular cases that artificial kind of knowledge which skill in a trade or profession can give. Now we think this is not only to take a wrong view of the jury's province, but to prevent the evidence from being fairly or impartially considered. We must give the jury all legal and relevant aids; and if a scientific or artistic point arises, we must, by the testimony of scientific men and artists, throw all the light we can on the issue; but that issue it is the sole duty of the unprejudiced jury to satisfy. The jury are to take cognizance of all the evidence: of scientific and technical evidence as well as evidence of the fact; they are to entertain everything which the law allows; and by allowing, requires them to know, that they may form a true judgment on the disputed right. *Ad questionem facti respondent juratores, ad questiones juris respondent judices.* Between these two provinces there is no middle authority; the jury are to try the fact; the judge to lay down the law; but the fact is to be considered with reference to the right or interest in issue. Keeping these principles in view, we discern the real nature of the jury's social and judicial constitution. A jury should be in all respects quite indifferent. The juror is a judge, not a witness; and he is to decide on information afforded by competent persons, and

not from any independent views of his own. That is to say, he is to decide on evidence; evidence external to his own intuitive knowledge. And anything that interferes with this constitutional relation, whether it be an influence emanating from inherent qualities in the juror individually, or in some other way, by which a bias is created in his mind, so far deranges proper judicial order. In short, the true ideal of a jury is, that they are to proceed to their duty without any presumptive impression as regards one side or the other."

A Scotch case, involving a good deal of the evidence of the kind in question had occurred, and it was complained that,

"Not one coalmaster or mining engineer was on the jury, But this is no good objection. The kind of information which such classes of persons were fitted to supply was purely matter of evidence, and the witness-box, and not the jury-box, was their true place. Their professional skill was not substantially and *per se* in issue, but was merely collateral, and receivable in evidence in order to instruct the minds of the jury on the fact, as that relates to the interest, the right or the wrong, in litigation. And if it is necessary to know about coal driving, and mining, and engineering, by all means let the jury be duly indoctrinated therewith. Put the collier, and the miner, and the engineer into the box; examine them well and thoroughly; try and search the depths of their scientific and professional minds, and then dismiss them with thanks for their information; but do not allow them to interfere further with the case, else the collier may make it too black, the miner may take too much out of it, and the engineer may blow it up altogether! There is something more to be done; there is a general conclusion to which, among other particulars, the scientific evidence is merely inductive; and although colliers, and miners, and engineers may know a great deal about, and be most useful men in their respective crafts and trades, they may not be the most competent persons for the protection of an interest, the vindication of a right, or the redress of a wrong."

I still entertain these opinions very strongly, and as I have suggested, the argument applies as well to assessors as to jurors; perhaps indeed more forcibly in the case of the former, for, with the notorious bias and jealousy that prevail among scientific persons and persons of skill, from the mere mechanic or skilled artisan up to the Prince-engineer, to have two such assessors sitting with the judge would, I think, involve a hazardous experiment, not only in relation to the authority and dignity of the judicial office, but also with respect to that feeling of confidence in the impartiality and

indifference of the judge, which in this country is associated in the mind of the public and the Bar with the efficiency and integrity of the Bench, and which feeling of confidence it would be dangerous to disturb. I therefore entirely concur in the report of this Society, to which I have referred wherein it is stated:

"According to that scheme, assessors should be appointed who should sit with the judge, and should be bound to give their opinion in public, as well as the reasons on which that opinion was formed, the judge, however, not to be bound by the opinion so given. It must be supposed that the assessors would be persons of competent skill; and it is difficult to understand how the judge would not be morally, if not legally, bound by their opinion, or that any verdict could be supported which went against such opinion. Nor can it be doubted that, if any difference of opinion arose between the judge and the assessors on a matter which the jury must ultimately determine, the latter would be placed in a position of considerable embarrassment. In trials before the Admiralty Court, where the judge is assisted by Masters of the Trinity House, there is no jury; and after carefully considering the working of the system adopted in that court, we are of opinion that it is altogether inapplicable to the ordinary mode of trial by jury."

The plan of assessors is further objectionable, inasmuch as it would introduce a lay quality into the judicial element that would hamper the judge, interfere with his discretion, and cause confusion in the trial.

It has also an aspect suggestive of something unconstitutional, by neutralizing or tending to neutralize that undivided responsibility in the judge which is one of the chief safeguards which our legal system affords to the nation.

In every view this proposal for assessors appears to me most objectionable. It is, in my judgment, so inconsiderate and wrong, that it is a satisfaction to me to reflect that it was originated by medical, scientific, and other persons who, from their position and calling, are unacquainted with the delicate character of the conditions of legal procedure, and not from our own profession. Indeed, I say it with all respect and deference, that the proposal is unlawyerlike, because it appears to me to take a low and unworthy estimate of the comprehensive nature of the principles of jurisprudence —the greatest and grandest of all sciences; and I sincerely trust that the impression which it appears to have made on some of the lawyers of this Society may be but transient—that it may speedily pass away altogether, and give place to sounder and juster, and, I may add, more manly notions of legal investigation. I therefore

hope and trust that the Society will adhere to its former opinion on this subject, and negative this scheme of assessors.

But, while I am so strongly opposed to scientific assessors and scientific jurors, I am not insensible—it is impossible to be insensible—to the inconvenience that has been experienced in taking scientific evidence, and which will probably continue to be experienced unless some well considered change is made in this respect.

I cannot help thinking however that if trials, especially trials at law, were conducted with a little more consideration and reserve—I had almost said reticence—on the part of counsel, and with less of that demonstrative anxiety and burly dogmatism of tone and manner by which advocacy, in its more scrupulous development, is too often disagreeably distinguished in our courts,—I say, if there were a better condition of things at nisi prius and the Old Bailey, and if such trials as I have referred to were a little more gentlemanlike, and a little more scholarlike, we should hear less than we do of the evils and drawbacks of the existing system.

But, making every allowance, I still think there is room for improvement, although I trust that the Society will not for one instant admit Dr. Smith's claim that the scientific witness shall occupy at the trial an "independent position," as he calls it. That would never do. The scientific man or the expert, when called on to assist in the administration of right and justice, to use the words of the great charter, must do so as a *witness*, and a witness only—a witness in the ordinary sense of the term. But his services might be considerably enhanced by one or two regulations, to be applied with a due regard to the special nature of the case to be tried. It has been complained, as one cause of the dissatisfaction with this kind of evidence, that the scientific witness often gives it without adequate information respecting the facts in dispute; and it had been suggested that, for the purpose of such evidence at least, the facts should be previously communicated to the witness *in writing*. The answer to this, however, is a forcible one, namely, that many important facts to which the scientific witness may have to speak cannot be known until they are disclosed orally at the trial. Yet, I think, the suggestion made is worthy of the best consideration, and it might be regulated so as to be used with advantage in particular cases. On this subject I venture to propose as follows:—

1st. That rules be adopted by which both parties should be bound, by the form of their pleadings, and other matter of record, fully to disclose the case they are respectively to make at the trial.

2d. That a written statement, taken from the pleadings, and other matter as may be agreed on, and expressed in as popular language as possible, should, previous to the trial, be adjusted and settled in the presence of both parties, before the judge himself, or his principal registrar, or some other proper officer.

3d. That an office copy of this statement be furnished to each scientific witness or expert, at a certain time before the trial, and that at the trial the scientific witness or expert should be required to give his evidence with reference to such statement. This would, however, not exclude any relevant amplification at the hands of counsel, care at the same time being taken that the material facts stated are neither added to nor contradicted, the object being that, whatever may transpire at the trial, the evidence of the expert or scientific witness shall still run in the channel indicated by the statement of the facts.

4th. I propose that in certain cases, to be discriminated and regulated, the scientific witness or expert should, so instructed as to the facts, be allowed to give his evidence *in writing;* care being taken by, if necessary, a strict preliminary examination, that the written evidence he puts in expresses fully and conscientiously his mind on the subject. In this written evidence, I would allow the witness to be further examined and cross-examined orally at the trial, but only in the way of explanation, and not so as to affect the witness's credibility.

5th. Where, notwithstanding all these precautions (and others that might perhaps be adopted), there still remains a serious conflict of opinion between or among scientific witnesses and experts, if there are more than two, it might be expedient to adjourn the trial, and that, in the meantime, these witnesses should exchange each others written evidence, meet together and confer together; and, when the trial is resumed, that they should respectively state to the Court whether, and in what respects, their former evidence has been affected or qualified. I would not then allow any further examination or cross-examination, excepting with the express leave of the Court, on cause shown; and,

6th. I propose that no new trial should be allowed on the ground of the verdict being against the weight of the scientific or the skilled evidence, nor on any ground involving a rehearing of such evidence; and it might be convenient, in particnlar cases, that a power should be reserved to the Court to order the scientific or skilled evidence, or the material parts of it, to be entered as facts on the *postea* at law, or in the return of the verdict in equity.

Other rules and regulations might be made with a view of making this kind of evidence more conducive to the ends of justice in our courts than it is considered to be at present. But the above proposals are the result of the most anxious considerations on my part, and I respectfully submit them to the Society.

It will have been observed that I have made no distinction between the cases where the evidence is purely and exclusive scientific, and where it is of a mixed nature. I was at one time disposed to think that the regulations in the former case might be different

from those to be adopted in the latter; but on further consideration I think it better that the rules should be the same in the one case as in the other.

In either case the result must be the determination of a question of fact or of right, which is best left to the verdict of a jury.

NOTE.—The above paper is confined, as will have been observed, to the general question of scientific evidence and the evidence of experts, and does not particularize the special case of the trial of patent rights. It is the opinion of many lawyers that these latter require amendment in the procedure of an exceptional kind; and Mr. Thomas Webster has proposed, in a paper he read before the Law Amendment Society, on the 18th of May last, that in such cases there should be scientific assessors to sit with and assist the judge; and that the mode of trial, whether by jury or by the Court alone, should be left to the option of the parties, under regulation as to the nature and circumstances of each particular case. For myself, I confess I am opposed to assessors in all cases—although I can quite understand that the infringement of a patent might often be better tried without a jury.—R. S.

THE LORD CHANCELLOR'S PLAN FOR DIGESTING, BY A COMMISSION, THE COMMON LAW OF ENGLAND.

THE following is taken from *The Solicitors' Journal* of the 1st August. It is given to the Profession by a contemporary as "communicated," an expression which we presume must be understood to mean emanating from some parties in authority:—

"The Lord Chancellor's speech on the revision of the law has elicited a strong expression of opinion against giving to commissioners direct powers of codification—that is to say, powers which would enable them to alter brevi manu the law of England, or any part of it. That law is a matured system—the growth of centuries. It may have defects, but these are not to be cured by a coup de main, or by the legislation of a board. The example of foreign countries and of despotic governments is no rule for England, especially if the end sought can be otherwise accomplished.

"Lord Cranworth has remarked that the bulk of English law is 'well settled.' And it must be owned that after hearing counsel the judges rarely disagree in pronouncing their decision. A suit makes the law transparent. But, until tried forensically and judicially, it is often unknown, and almost always uncertain. It exists, indeed, but the difficulty is to find it out and make sure of it. Searches painful and laborious result in an attempted reconciliation of innumerable precedents—many of them obscure and contradictory, and all of them dispersed. The Lord Chancellor thinks that these should be examined carefully by a royal commission. He

proposes to deduce the law from them, and to set it forth in order. He hopes to make a perpetual reference to 1200 volumes of reports unnecessary. There is in this, we think, nothing to alarm or beget jealousy. To alter the law will not be within the scope of the commission. It will not interfere with the current reports, and it seems scarcely necessary to say that it will not invade copyright.

"High opinions are divided on the question of *code* or *digest*. Sir Samuel Romilly was for a code, as appears by the valuable article in the *Edinburgh Review*, of 1817—the last production of his pen. The profound jurist, Mr. Austin, was strongly for a code. His second and third volumes are full of wise and cautious suggestions. Lord Lyndhurst is for a digest. Lord Brougham is, or was, for a code. Lord Campbell was ultimately for a code, and came to regard it as almost a necessity. Lord Cranworth would be for a code if he would get a 'perfect one'—a thing of course unattainable. Lord St. Leonards holds that the Exchequer Chamber or House of Lords must do the work, which seems but another way of saying that it is impracticable. Lord Kingsdown thinks a code would be liable to change, for that Parliament would alter it every session, but he has not said that a digest would be preferable. The Lord Chancellor is of opinion that 'it is to the form of a code that the law of any advanced nation ought ultimately to be reduced.'

"Here, then, we have Sir Samuel Romilly, Mr. Austin, Lord Brougham, Lord Campbell, and the Lord Chancellor opposed, with more or less qualification, to Lord Lyndhurst, Lord Cranworth, Lord St. Leonards, and Lord Kingsdown. But it may be doubted whether the differences which subsist between the law peers are not rather verbal than substantial. An accurate and safe enunciation of English law would probably receive the approbation of them all; and whether we should call it code or digest seems not very material. No digest could be promulgated without arrangement; and what, it may be asked, is an arranged digest but a code?

"It would seem that the execution of the work (by whatever name we call it) must be cautious and progressive; beginning with those parts of the law which, though unarranged, are, to use Lord Cranworth's expression, 'well settled,' and advancing afterwards as the law itself advances, and as the temper of the public mind accompanies it. A systematic digest or incipient code might thus be prepared, consisting of text and notes (with references to the authorities)—the text setting forth the law so far as 'well settled' at the date of its publication; the notes pointing out its blemishes and its defects. Such an incipient code—brought out, after great deliberation, by a commission including the Lord Chancellor and other high functionaries and ex-functionaries—would be of instant value to the practising lawyer and to the judges, besides proving highly acceptable to the public at large. I would give con-

fidence to legal opinions, and prevent litigation in many cases where counsel, after balancing authorities, advise dubiously a suit or a defence. It would gradually supersede the anterior law reports, the burthen of which has lately been pronounced 'overwhelming.' In truth, this seems the only rational way of undermining the empire of old precedents. Story affirms that the best mode of attaining this end is by a 'gradual digest of those parts of the law which shall from time to time acquire scientific accuracy.'

"The incipient code, with its notes, being submitted to Parliament and the country generally, the next duty of the commissioners would be to receive from all proper quarters opinions and suggestions respecting it. Questions would be drawn up and circulated, inviting responses; and witnesses, if necessary, might be examined orally. The information thus collected would be arranged and printed for general circulation. Thus the whole nation would be gradually made familiar with our jurisprudence, not omitting those parts of it which might require emendation.

"It may be said that the scheme here propounded would be tedious, and trying to the patience of the public. The want of despatch, however, would be counterbalanced by advantages of greater value."

RECENT AMERICAN DECISIONS.

District Court of the United States.

District of Massachusetts.

UNITED STATES *v.* ZENO KELLY.—July, 1863.

An indictment for aiding in fitting out a vessel for the slave trade, under Act 1818, Ch. 91, Sec. 3, must contain an allegation that the vessel was fitted out for that trade by some person other than the defendant, and that that person had the intent to employ her in that trade, and that the defendant did aid and abet such person in so fitting out. It must also aver that the fitting out was done at a port within the United States. It is not sufficient to allege that the defendant had the intent, or that the aiding by the defendant was at a port in the United States.

The defendant was found guilty upon one count in the indictment, the material words of which were as follows:—

"Zeno Kelly, of New Bedford, in the District of Massachusetts, merchant, at New Bedford, and within the jurisdiction of this court, on the said first day of July, in the year of our Lord one thousand eight hundred and sixty, he the said Kelly being then and

there a citizen of the United States of America, did then and there *aid and abet in fitting out*, equipping and otherwise preparing a certain ship and vessel called the ship *Tahamaroo*, for the purpose of procuring and with intent to employ said ship and vessel in the trade and business of procuring negroes," &c.

A motion in arrest of judgment was made. The count was founded on the third section of the Act of the United States 1818, Ch. 91, against the slave trade, the material words of which are as follows:—

"Every person so building, fitting out, equipping, loading, or otherwise preparing * * * , with intent to employ such ship or vessel in such trade or business * * * * , or who shall in any wise be aiding or abetting therein, shall, on conviction, &c." The question was whether the count sufficiently described the offence of aiding and abetting, under the statute.

R. H. Dana, Jr., for the United States.

The third section is connected with the second. It does not create two offences, one of a principal and the other of an accessory, but creates a misdemeanor, in which all are principals. The true reading of the section is this—it prohibits any person from doing any act or taking part in the fitting out, &c., either as master, owner, or factor, or in any other wise, with an intent, &c. If he fits out, or co-operates in fitting out, being an owner, agent, or factor, he is specifically described; but if he takes part in any other capacity, not that of master, owner, or factor, he is included under the terms "who shall in any wise by aiding or abetting therein," and is equally a principal. The words "aid and abet" in this connection have the force of "co-operating."—(*United States* v. *Gooding*, 12 Wheat. 476.) If a person has a contract by which he has the control of the voyage, and yet is not, in law, either master, owner, or factor, and takes a part in fitting out the vessel, he can be indicted for aiding in the fitting out with the intent, &c. The words "aiding and abetting" are a sufficient allegation that others were concerned with him, as owner, master, or factor, if that be necessary.—(*United States* v. *Mills*, 7 Pet. 138.) Admitting that an intent to employ her in the slave trade must be alleged on the part of some person having the control, the control is not limited to a master, owner, or factor. The case of a charterer or supercargo having an interest and control would be covered by this count; and if not, such person could not be indicted at all, except as aiding a master, owner, or factor, who had the intent; and if they had not the intent and he had, he could not be indicted. In this case, the jury may have thought that Kelly was neither master, owner, nor factor, but had the intent and the power to employ her in the slave trade; and the owners, and master, and factor, if there were any, may have been innocent.

It is sufficiently alleged that Kelly did his acts of co-operation in New Bedford, and the statute does not require allegations or proof of the place where the vessel lay.—(*United States* v. *Gooding*, supra: Wharton's Precedents, 1085.)

J. M. Blake, (of Rhode Island,) and *E. L. Barney*, for the defendant.

SPRAGUE J.—This is a motion in arrest of judgment. The count on which the verdict was rendered is as follows. [The learned judge then read the count as given in the statement of facts.]

Does this count set forth a criminal offence, or may all the allegations be true, and yet no offence have been committed.

This requires an examination of the Statute of 1818, Chap. 91, upon which the indictment is founded.

By the second section no person shall "for himself or any other person, either as master, factor, or owner, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, * * * for the purpose of procuring any negro," &c.

This section subjects the vessel to forfeiture, but creates no criminal offence.

By the third section "every person or persons so building, fitting out, equipping, loading, or otherwise preparing, * * * * with intent to employ such ship or vessel in such trade or business, * * * or who shall in any wise, be aiding or abetting therein," shall on conviction, &c.

This indictment alleges that the prisoner did at New Bedford, "aid and abet in fitting out, equipping, and otherwise preparing," the ship *Tahamaroo*, &c.

The statute describes only a misdemeanor. And the indictment, although it charges the prisoner only with aiding and abetting, still is designed to charge him with a substantive offence. But that offence is secondary in its character, and cannot have been committed unless the primary offence has been committed, and the indictment must allege the commission of such primary offence.

This was expressly decided in *United States* v. *Mills*, 7 Peters, 138. It being thus indispensable that the indictment should set forth the primary offence which the prisoner is alleged to have aided and abetted, we must inquire what that primary offence is. It is created by the first part of the third section, which says that every person or persons, so fitting out, equipping, or otherwise preparing, with intent to employ such ship or vessel, in such trade, &c.

Here we see that to constitute the primary offence two things are necessary.

First, that some person or persons should have so fitted out a vessel.

Second, that such fitting out should have been with intent to em-

ploy her in the slave trade; that is that the person so fitting out should have such intent. Does the indictment contain both these requisites. I will consider the latter, that is, the intent first.

In *Goodiny's Case*, 12 Wheat. 460, it was decided that it is not a sufficient description of the offence to allege that the actor fitted out the vessel with intent that she should *be employed*, &c., but that it must be alleged that it was with intent to employ her, &c. Does this indictment allege that the *Tahamaroo* was fitted out by any person with intent *to employ* her in such trade. That is, is it alleged that any actor in the primary offence, fitted out this vessel with intent to employ her. So far from it, that it is not even alleged that any such actor had any intent whatever. The only intent alleged is that of the prisoner. The indictment says that Kelly aided and abetted in fitting out the *Tahamaroo* with intent to employ her. This allegation may be true, and yet the primary actors may not themselves have intended to employ the vessel in the slave trade. They may have only intended that she should be employed by others, or to employ her themselves in some other business. The evidence in this very case shows how this might be. The *Tahamaroo* was fitted out as a whaler, but it was supposed that after pursuing that business for a while she was then to engage in the slave trade. Now it may be that certain persons fitted out the vessel without intending to employ her in the slave trade, and yet that Kelly aided and abetted in fitting her out with intent on his part so to employ her. He might for example have a contract by which he could control her as a charterer, or purchaser, or otherwise. This indictment does not follow the language of the statute which provides that every person so fitting out any vessel with intent to employ her in such trade, &c., and every person *aiding and abetting therein* shall be punished. Now to follow the statute it is necessary to allege that some person did fit out the *Tahamaroo* with intent to employ her in the slave trade, and that Kelly did aid and abet therein; that is, did aid and abet in the commission of the offence just described. I do not mean to say that it is necessary that the indictment should adopt that precise phraseology. It is sufficient if the language be such as clearly alleges the primary offence.

Upon the authority of the case of *United States* v. *Mills*, above cited, I should hold that the allegation that Kelly did aid and abet in fitting out, necessarily imported and therefore sufficiently averred that the vessel was fitted out by some person or persons; and if that alone constituted the primary offence, it would have been sufficient. But the intent of such person or persons to employ her in the forbidden trade is an essential part of that offence; *Gooding's Case*, 12 Wheat. 472. And that intent is not alleged even by implication, because Kelly may have had the intent to employ the

vessel in the slave trade, although, as we have seen, the persons whom he aided in fitting her out, may not themselves have intended so to employ her.

I proceed now to inquire whether this indictment contains the other requisite. Does it allege that the *Tahamaroo* was fitted out in any port of the United States. That this is necessary to constitute the primary offence is expressly decided in *Gooding's Case*, 12 Wheat. 472. Does this seventh count contain that allegation. It avers that Kelly, at New Bedford, in the District of Massachusetts, and within the jurisdiction of this court, on the said first day of July, * * * * did then and there aid and abet in fitting out, equipping, and otherwise preparing a certain ship and vessel called the *Tahamaroo*.

May this allegation be true, and yet the *Tahamaroo* have been at some place beyond the limits of this district when she was fitted.

Judge Story, in delivering the opinion of the court in *Gooding's Case*, says: "We do not consider that the terms 'aid' and 'abet,' used in this statute, are used as technical phrases belonging to the common law, because the offence is not made a felony, and, therefore, the words require no such interpretation. The statute punishes them as substantive offences, and not as accessorial, and the words are therefore to be understood as in the common parlance, and import assistance, co-operation and encouragement.

From this exposition of the terms aiding and abetting in the statute, it appears that they do not necessarily import that the aider or abettor must be present at the commission of the primary offence. It seems, therefore, that the vessel might be actually fitted out in one place and the distinct substantive offence of aiding and abetting be committed in another. Thus the acts which constituted the aiding and abetting may have been done in New Bedford; for example, the prisoner may there have furnished money to the primary actor, or given him information and advice, or shipped seamen, although the vessel was actually in New York and fitted out there. In such case neither the primary actor nor any person at New York would be the agent or instrument of Kelly; and his acts being all done in New Bedford, his offence was committed there, and not at New York, where the vessel actually was. At common law an accessory was indictable in the county where the acts of counselling, procuring or commanding, which made him an accessory, were done, although the principal offence was committed in another county. And statutes both in England and in this country provide for the punishment of an accessory either in the county where he committed his offence by counselling, procuring or commanding, or in the county in which the principal offence was committed; thus expressly declaring that the offence of the accessory may be complete

in a county other than that in which the principal offence was committed.

Archb. 73–4, 80, 250–1.

If the indictment had alleged that this vessel, "being in the port of New York, certain persons did then and there fit, equip, and prepare her, with intent to employ her in the slave trade; and that Kelly, well knowing that said persons were so fitting, equipping and preparing her, with intent so to employ her, did, at New Bedford, aid and abet them in so fitting, etc." I do not think that it could have been objected that the averment that the vessel was fitted out at New York was inconsistent with the averment that the prisoner did at New Bedford aid and abet such fitting out.

I cannot think that the allegation that the prisoner did at New Bedford, aid and abet the fitting out of the *Tahamaroo* necessarily imports that she was fitted out at that place. She might have been either at New York or Havana.

There is, therefore, no allegation that she was fitted out in a port of the United States.

Before closing, it is proper to notice an argument founded on the third count in Gooding's case. It is contended that that count had the sanction of the court, and that the one now before me is like it.

The third count in Gooding's case alleged that the prisoner, a citizen of the United States, and residing therein at the District of Maryland, "and within the jurisdiction of this Court, did aid in fitting out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, a certain other vessel called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes," etc.

The only objection made to this count was, that it did not "charge any offence to have been committed by any principal, to whom the defendant was or could be aiding or abetting."

The court, in answering this objection, say, "the fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor; and the doctrine, therefore, cannot be applied to it." The court further say, that in misdemeanors all are principals, and that no question of actual or constructive presence can arise; and that in the case before them, the indictment is in the third and fourth counts laid by aiding and abetting in the very terms of the act of Congress.

They further discuss the force and effect of those words. In saying that the count was in the words of the statute, the court must have referred only to the words aiding and abetting. They could have no reference to the allegation of intent, because in the

third count the language is with intent that the vessel should be employed, which the court, when their attention was subsequently called to it in connection with the sixth count, declared to be wholly different from the language of the statute.

Nor was anything said in disposing of the third count, of the necessity of its appearing that the vessel was fitted out in the United States, though that was held to be essential when the point was raised on subsequent counts. Perhaps the third count was in this respect sufficient. It alleges that the prisoner, at the district of Maryland, did aid in fitting out the vessel in the port of Baltimore.

If the words "in the port of Baltimore" had been omitted, it would have been like the indictment now before me. That is, it would have said that he did at Maryland aid and abet in fitting out. Adding the words "at Baltimore" may perhaps be considered as qualifying the words fitting out and designating the place where that was done. I do not think that the court, in disposing of the third count, intended to decide that it was not necessary that it should appear that the vessel was fitted out in the United States, and with intent to employ her in the slave trade, because it would be inconsistent with their decision on the sixth count, and also with the subsequent decision of the supreme court in *Mill's Case*, 7 Peters.

The truth is, the court in regard to the third count confined their attention to the single objection, made to it by counsel, and to one aspect of that objection, and are not to be understood to have decided that the count was in all respects sufficient.

Judgment must be arrested.

Massachusetts, June 20, 1863.

THE ALMA.—(Prize.)

The proclamation of the President, of May 12, 1862, with the regulations of the Secretary of the Treasury accompanying it, must be construed to be an entire raising of the blockade of the ports named therein, as respects neutrals. The proviso respecting licenses is a regulation of trade with ports in our military occupation.

In this cause there was no claim. The hearing was on the preparatory proof, and some further proof for the captors.

The learned judge analyzed carefully the evidence and declared his opinion to be that the vessel, an English schooner sailing from Nassau, although ostensibly bound to Beaufort, North Carolina, was in fact attempting to enter one of the blockaded ports, near to that port. The learned judge then proceeded as follows:

SPRAGUE J.—I have so far treated the case as if a destination to Beaufort, N.C., was an innocent destination at this time. That port

was placed under blockade by the proclamation of April 27, 1861, and was under actual blockade until it was taken by our troops. On 12th May, 1862, the President issued a proclamation declaring that as to the ports of Beaufort, N. C., Port Royal, S. C., and New Orleans, "the blockade may now be safely relaxed," and declaring the blockade so far to cease as to allow commercial intercourse with those ports, "subject to the laws of the United States, and to the limitations and in pursuance of the regulations which are prescribed by the Secretary of the Treasury in his order of this date." This order gives notice that to vessels clearing from foreign ports to the "ports opened by the proclamation," licenses will be granted by the United States' consuls, upon evidence that the vessels will deal in no contraband persons or property, which licenses shall be exhibited to the collectors of the ports and to the blockading vessels, if required. It then declares that "in all other respects the blockade remains in full force and effect as hitherto established and maintained; nor is it relaxed by the proclamation, except in regard to ports to which the relaxation is by that instrument expressly applied."

It is suggested that the proclamation merely relaxes the blockade of these ports so far as to let in vessels so licensed. But, although the language is not clear, I think that, on general principles of the laws of war affecting neutrals, I must hold that the proclamation entirely raises the blockade of those ports as to neutrals. The proviso respecting the license is a regulation of trade with a place in our military possession; and whatever might be the effect, in another proceeding, in case a vessel should enter one of those ports without a license, or should violate the license, it would not make her a prize of war for breach of blockade. Otherwise, I should be obliged to hold that the obstacle of a blockade, as to each neutral vessel, depended upon the decision which the several consuls of the United States, at the several neutral ports over the globe, might make in the case of every vessel applying for a license; while our own vessels, sailing coastwise, are to apply for licenses to the department of the Treasury.

But while the absence of any license to this vessel from the American consul at Bermuda does not make Beaufort a prohibited port to her, it is corroborative evidence that she was not bound there. This proclamation and order must have been known in Bermuda for nearly ten months before this vessel sailed; and it can hardly be supposed that a British merchant, sole owner of vessel and cargo, would have sent her to Beaufort without a license.

The vessel and cargo are to be condemned for an attempted breach of blockade.

R. H. Dana, Jr., for the United States and Captors.

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court.—Suffolk.

JOHN J. RAYNER, ASSIGNEE, *v.* H. WHICHER.

An action of tort to recover the value of certain property alleged to have belonged to one Hawkins, an insolvent debtor, and claimed by plaintiff as assignee of the estate. The plaintiff claimed that the defendant received the goods, the value of which he seeks to recover, of said Hawkins under color of a sale made in contemplation of insolvency by said Hawkins, and with the intent to prevent the property so sold from coming to his assignees; and that defendant had reasonable cause to believe Hawkins was insolvent, or in contemplation of insolvency, and that the sale was made with such intent.

It appeared in evidence, and the court found, that the defendant purchased the goods of Hawkins, May 7, 1861, and gave his note for them, which note was endorsed by Hawkins, and at the same time delivered to A. V. Lynde, Esq.; that at the same time Hawkins signed a petition to the Court of Insolvency as an insolvent debtor; that said petition was filed in the Court of Insolvency, and a warrant duly issued thereon against the estate of Hawkins, on the 8th day of the same May; that the warrant was delivered to the defendant as messenger on the 8th or 9th of May, 1861; that the first publication of the warrant was on the 9th of May, 1861; that Hawkins was in fact insolvent, and in contemplation of insolvency, when the sale was made, and made the sale with the intent of preventing the property so sold, or the proceeds thereof, from coming to the hands of his assignee; and that the defendant had reasonable cause to believe him insolvent, and in contemplation of insolvency; and that the sale was made with intent of preventing the property so sold, or the proceeds thereof, from coming to the hands of said Hawkins's assignee; and the sale was fraudulent and void, under the insolvent laws of this Commonwealth.

There was evidence tending to show that the object of Hawkins in making the sale was to obtain funds for the payment of counsel fees and the expenses of insolvency proceedings, but the defendant expressly negatived any knowledge of such intent. It was admitted that the requisite deposit of forty dollars in the Insolvency Court was made by and in the name of Mr. Lynde, and services were rendered Hawkins for amount of said note; and defendant asked the court to hold that Hawkins had a right to sell any and all of said property for the purpose of paying court, messenger, and counsel fees, in insolvency, and if so applied this sale was valid.

The court found that this was the object in making such sale on the part of Hawkins. It further appeared that defendant paid the note at maturity.

It appeared in evidence that the 240 pairs shoe uppers claimed by the plaintiff, were, when sold to the defendant, bound and ready to be made up; that before the appointment of the assignee, Hawkins, with the defendant's consent, took these uppers, procured soles and other stock for them, and had them made and sent on sale to one Putnam, in Boston; that the plaintiff claimed them of Putnam, who held them or their proceeds at the commencement of this suit. It also appeared and was admitted that Hawkins had two sewing machines, which he sold defendant; the plaintiff claimed only one. The defendant asked the court to hold that one sewing machine was exempt, and the other is to be included under the appellation of "tools and machinery," which by statute are to be exempted to the amount of $100; that the kid skins, linings, rubber gorings, and shoe uppers, were materials or stock procured and intended and necessary for carrying on Hawkins's trade or business, and not exceeding the value of $100, were exempt under the statute; that the defendant could be liable only for property in his hands at the date of the suit, unless the plaintiff shows a conversion before, but not for the property taken by the insolvent before, nor for any portion which was exempt by statute; that the plaintiff could not recover the value of the shoe uppers, as they had been removed by Hawkins and claimed by plaintiff of Putnam before this suit was brought, and were not in defendant's possession at date of suit. That the plaintiff did not establish by preponderance of evidence that defendant had reasonable cause to believe Hawkins insolvent at the time of the sale; and having given and paid his note for the fair value of the property, the plaintiff could not recover. The court found, as matter of fact, upon the evidence, that Hawkins at the time of the sale was insolvent, and in contemplation of insolvency, and that the sale was made with fraudulent intent; that the defendant had reasonable cause to believe both of these facts; that the defendant took possession of the property immediately after the sale; that the transaction as against the plaintiff as assignee, was fraudulent and void; that some of the articles sold were not under any statute exempt; and that the materials were not exempt as claimed by the defendant; and held as matter of law, that the defendant could not under such sale avail himself of any right of exemption which Hawkins might have had in a part of the property sold; and that as the defendant had taken possession of the property sold, he was liable to the plaintiff for its value, and ordered judgment for the plaintiff.

The defendant excepted. Exceptions sustained, and new trial ordered.

Rescript. "The defendant might, as to any articles of personal property which were exempted by Gen. Stat. ch. 133, from attachment and levy of execution by the creditors of the vendor, avail himself of such exception to defeat a recovery by an assignee of the vendor, claiming the right to such property, although the vendor at the time of the sale was insolvent, and in contemplation of instituting proceedings in insolvency; and the vendee had reasonable cause to believe the same, and the sale was made under such circumstances as would as to property not exempted from attachment have been fraudulent and voidable.

2. The Statute 1860, ch. 65, exempts one sewing machine of a value not exceeding $100 from attachment, and this is in addition to any property that may be exempted by Gen. Stat. ch. 133, § 32.

3. The second sewing machine owned by the debtor, and sold to the defendant, may also be embraced under the exemption clause "of tools, implements, and fixtures," § 32, exempted to the amount of $100, if the whole claim for exemption for tools and implements and fixtures does not exceed that sum, and it be further shown that the same was necessary for carrying on the trade and business of the owner.

4. The kid shoes, linings, rubber gorings, and shoe uppers, if materials or stock necessary for carrying on the trade and business of the owner, and intended to be used or wrought therein, and not exceeding $100 in value, would be exempt from attachment by creditors.

5. As to any articles embraced in the sale to the defendant, but which are shown to have been returned to the possession and disposal of the debtor, and by him disposed of as his own to another person, before the institution of any proceedings in insolvency, the defendant would not be responsible to the assignee."

Edward Avery for plaintiff; *Wm. P. Harding* for defendant.

Oliver King *v.* Luther A. Ham.

An action of tort, alleging the conversion of a promissory note for $300, signed by one Brewster, payable to the plaintiff, and his property. It was proved that on Dec. 21, 1855, a warrant was issued by the police court, in Boston, against the plaintiff and others, charging them with larceny of $50,000 in gold, property of the American Express Company; that defendant was deputy chief of police; and that he, with other officers, arrested the plaintiff at Lawrence, on Dec. 22, and there searched him, and took from his person a watch, about $1800 in bank-bills, and the note above named; and that plaintiff was committed to jail in Boston the next

day; the watch, money, and note, being in defendant's possession. That on Monday following, December 25, plaintiff having procured bail, demanded of this defendant the money, watch, and note; that the defendant had been advised by the counsel having charge of the prosecution for the complainants against King and others, that the note was evidence necessary to said prosecution, and had been directed to retain the same to be used as such evidence; and that said Ham, in good faith, solely for that purpose, refused to deliver said note to the plaintiff, and retained the same. That said note was in fact afterwards used by the prosecution in the examination of the complaint against King and others, before the police court, and before the grand jury; and at the trial of King at Detroit, Michigan, for said larceny, for the sole purpose of showing that said plaintiff had in his possession a large amount of property for which he could not account, there being no pretence of showing that this note was not the property of the plaintiff, that said King was convicted of said larceny, and sentenced to imprisonment for the term of five years, more than four of which he served out.

That said Brewster was solvent, and able to pay said note for two years after said King was imprisoned, and would have paid it on request, but then became insolvent, and has so ever since continued; and that no other demand has ever been made on defendant for said note, nor did he ever tender the same to King until after said Brewster became insolvent.

The court ruled as matter of law, that Ham's refusal to deliver said note to King upon demand, and retaining it after such demand, was a conversion thereof, upon which this action could be maintained, and that the measure of damages is the value of the note at the time of conversion and interest thereafter.

Defendant excepted. Exceptions overruled.

Rescript. "The facts of the case as stated in the bill of exceptions furnish no legal defence to the present action."

N. St. J. Green for plaintiff; *Henry F. French* for defendant.

ENOS BRIGGS *v.* BOSTON & LOWELL R. R. CORPORATION.

On the 13th June 1861, the plaintiff, who resides at Racine, Wisconsin, delivered to the Racine and Mississippi Railroad Company, 67 barrels of flour, taking from their agents their receipt, in which they agree to forward said flour by said Racine Railroad, to Chicago, and thence by propeller Evergreen City, by lake to Buffalo, and thence by New York Central Railroad to Troy; thence by Troy and Greenfield Railroad to Williamstown, Mass., and deliver the flour to Franklin E. Foster, of said Williamstown. By mistake of the agents of Racine Railroad Company, said flour was directed or

billed to Franklin E. Foster, Wilmington, Mass. The flour was forwarded over the above routes to Troy, thence by the Western and Worcester and Nashua roads to Groton, Mass., where it was delivered by the latter road to the defendants, to be transported over the Stoney Brook, Nashua and Lowell, and Boston and Lowell Railroad to Wilmington, Mass., according to the way bill, and it was so transported to Wilmington by the defendants, and all the way bills were delivered to the defendants, and they paid the sums due for freight to the road from which they received the flour; upon the arrival of the flour at Wilmington, it was put in defendants' freight and station building, and every inquiry was made for the consignee, but none could be found.

On 12th August, 1861, the master of transportation of Boston and Lowell Road, wrote to J. J. Sprague, having charge of the freight office of the New York Central Railroad at Troy, that the lot of flower in question was at Wilmington, and that no owner could be found for it. The same communications and inquiries for an owner were sent to the agents of all the roads over which the flour had passed, but no owner was found; but this was not known to the plaintiff, nor did the plaintiff know where the flour was till after it had been sold. The agent of the defendant road procured the flour to be stored at Wilmington for about two months, when the party storing it refused to store it any longer, and the freight station house of the defendants at Wilmington was so full with the ordinary freight that there was no room for the flour. It was then, by the principal manager of the defendant road, conveyed to Nashua, N. H., because it was believed that it would sell for more there than in Wilmington, Boston, or Lowell; and at the time of arrival of the flour it was becoming sour, and if kept at Wilmington it would soon have deteriorated in value; and the same was sold at auction, at Nashua, for $309.88, which was the fair market value of it then in Nashua, or in Boston or Wilmington. From that sum the defendant road, when called on for the value of the flour, claimed the right to deduct the sum of $100 for expenses, which were mostly made up in charges for freight which they had paid to the several railroad and transportation companies, by whom it had been conveyed to them, and the balance of the expenses of selling. The balance of said sum, to wit, $209.88, they offered to pay the plaintiff. The flour came to defendants in the regular course of their transportation business. They used their utmost exertions to find an owner, but could not. They kept the flour over two months, and if they had put the flour out of their warehouse it would have been spoiled by the weather. Had the flour been delivered to said Foster at Williamstown, he was to pay the plaintiff therefor the sum of $4.25 per barrel, amounting to the sum of $284.75, and the further sum of $2.50, advanced by the plaintiff, for insurance on

the same. Foster was to pay, in addition, the freight from Racine to Williamstown. The defendants were guilty of no laches in their attempts to find an owner for the flour. The court to render such judgment as the case and facts require.

"Judgment for plaintiff; the amount of damages to be recovered by the plaintiff is the balance remaining after deducting from the fair market value of the flour at the time of its sale by the defendants the amount of the lien which the defendants had thereon, being the aggregate of all the freight earned by the transportation of the flour from Racine to Wilmington, with interest on such balance from demand, or if there was no demand, from the date of the writ. If the amount cannot be agreed on by the parties, the cause is to be sent to an assessor; or if either party requires it, submitted to a jury, to assess the damages according to the rule above stated.

The transportation of the flour from Racine to Wilmington was in no part lawful, because it was all done under the authority and direction of the Racine and Mississippi Railroad Company, who were the plaintiff's forwarding agents.

The defendants having paid the preceding carriers the freight earned by them, had a lien therefor, and also for the freight earned by themselves, they having paid the preceding carriers under the authority of plaintiff's said agents.

The sale of the flour by the defendants was an unlawful conversion of it to their own use. The plaintiff therefore can recover of them in this action the fair market value of the flour, deducting the amount therefrom of the defendants' lien.

The sale by the defendants having been unlawful, no allowance can be made to them for expenses incurred in selling the same."

Linus & Linus M. Child, for plaintiff; *J. G. Abbott*, for defendants.

SARGEANT WHICHER ET AL. *v.* JAMES W. DAVIS ET AL.

Action of contract on a bond given to dissolve an attachment of the goods of G. W. Josslyn, made by plaintiffs, and submitted on an agreed statement of facts. A suit was originally brought by plaintiffs against one C. H. Mills, who pleaded non-joinder of said Josslyn. The plaintiffs thereupon filed a motion asking leave to amend their writ and declaration, by inserting therein the name of said Josslyn, as co-defendant with said Mills, praying that a new writ of summons to said Josslyn, requiring him to appear and answer in said suit, might issue out of the clerk's office, returnable upon the first day of the next term. This motion was allowed, and the plaintiffs thereupon took out a writ of summons and attachment, and caused said Josslyn's goods to be attached thereon. Said

bond was given to dissolve said attachment, and judgment was recovered against said Josslyn in said original suit, which judgment was not fully satisfied at the time this suit was brought. Defendants contended that said writ of attachment was wrongfully issued —that the attachment thereon was illegal, and the bond given to dissolve the same, was void. The court held that the plaintiffs were entitled to recover upon the facts; defendants excepted.

Exceptions overruled.

"The writ of 'summons' authorized by Gen. Stats. ch. 129, § 36, may be, according to Gen. Stats. ch. 123, § 10, 'either with or without an order to attach the goods or estate,' at the option of the plaintiff, if the court does not prescribe which it shall be. Either is a writ of 'summons' within the meaning of an order of court allowing a writ of 'summons' to bring in a new defendant."

F. A. Brooks, for plaintiffs; *J. M. Keith*, for defendants.

NOAH K. SKINNER ET AL. *v.* GEORGE W. FROST ET AL.

An action of contract upon a recognizance of the defendants. On 5th Sept. 1861, George W. Frost, one of the defendants, being under arrest upon an execution in favor of the plaintiffs, recognized before a Commissioner of Insolvency, with the other defendant, Daniel French, as surety in a given sum, as provided by Gen. Stats. ch. 124 § 10. On the 25th of September, 1861, Frost obtained from a competent magistrate, and on the same day duly served upon the creditors, the following notice:—

"*Commonwealth of Massachusetts*—Middlesex, ss.

To Noah Skinner, of Boston, in the County of Suffolk, and S. N. Skinner, of Cambridge, in the County of Middlesex, creditors.

George W. Frost, of Waltham, County of Middlesex, arrested on an execution in your favor, desires to take the oath for the relief of poor debtors; and the 27th day of September, at four o'clock in the afternoon, and the office of F. M. Stone, Esq., in said Waltham, in said county, is appointed the time and place for the examination of said debtor.

Dated at Waltham, this 25th day of September 1861." Which notice was signed by the magistrate.

Frost appeared at the time and place appointed in said notice. The magistrate, after an examination of the notice, decided that it was faulty, and insufficient in form, inasmuch as it did not designate whether by the month designated in said notice, was intended the then current month of September or otherwise. Frost was thereupon informed by the magistrate that a new notice and another ser-

vice upon the creditors would be necessary. After the magistrate and Frost had left the place appointed for the examination, but before the expiration of the hour, the attorney of the creditors appeared before the magistrate, and claimed that the examination should proceed. Efforts were made to find Frost, but without success; it being ascertained that on being dismissed by the magistrate, he had returned to his home. Oct. 3, 1861, Frost applied for and obtained a new notice from the same magistrate, which was sufficient in form, and duly served on the plaintiffs. At the time and place appointed in said notice for the examination, Frost appeared, and no appearance being made by the plaintiffs, the magistrate, after due examination, administered the poor debtors' oath to the defendant Frost. The court below, upon these facts, ordered judgment for defendants, and upon appeal this was affirmed.

Rescript. "The magistrate having refused to make an examination of the debtor, and having ruled that no further proceedings could be had under the first notice, the debtor did not depart without leave of the magistrate, or make any default at the time fixed for his first examination. The discharge under the second notice was valid, and there has been no breach of the recognizance declared on."

James D. Thomson, for plaintiffs; *Josiah Rutter*, for defendants.

RECENT ENGLISH CASES.

[*Before* COCKBURN C. J., WIGHTMAN, *and* MELLOR, JJ.]

FALKNER and Others *v.* EARLE and Others.—Jan. 20, 1863.

The custom existing in Liverpool of allowing discount upon freights payable on bills of lading of ships from ports in North America, is applicable to freights from ports in California since its annexation to the United States.

Case stated without pleadings.—The plaintiffs are shipowners and agents at Liverpool, and they have also a house at St. Francisco, in California. The defendants are merchants of Liverpool. On the 30th November, 1860, the plaintiffs' house at St. Francisco chartered the ship St. Helena, and shipped on board, as part of her cargo, 14,340 sacks of wheat, from St. Francisco to Liverpool, under a bill of lading, by which the wheat was "to be delivered to order or to assigns, on paying freight at the rate of 2*l.* 12*s.* 9*d.* per ton, without primage, and average accustomed." The bill of lading was forwarded to the defendants, indorsed to them, and on the

arrival of the vessel at Liverpool the defendants claimed and received the wheat as indorsees and holders under the bill of lading; the amount due for freight being 1657*l.* 1*s.* 1*d.* The defendants have paid the plaintiffs 1634*l.* 3*s.* on account of the freight, but refuse to pay the balance, 22*l.* 18*s.* 1*d.* (being three months' discount), on the sole ground, that by the custom of Liverpool, they are entitled to a deduction of three months' discount from the freight. It is admitted, that, according to the usual custom prevailing among merchants and shipowners at the port of Liverpool up to the time when California became a part of the United States of North America, as hereinafter mentioned, in the absence of special stipulation, three months' interest or discount is deducted from freight payable under bills of lading on goods coming from all parts in the United States of North America, whether such freights are paid by the shippers, the consignees named in the bill of lading, or by the assignees of the bill of lading. Many years ago a practice was introduced, and now prevails, of stamping on the bills of lading on shipment from New York, and all ports to the north of and including Baltimore, the words "freight payable in cash without discount;" and the deduction was not made in such cases. There have been only very recently any shipments direct from California for the port of Liverpool. The first vessel was The Harvey Birch, which arrived in Liverpool in November, 1855, and the freight of this vessel was paid, and received, less three months' discount, without dispute. The next vessel to The Harry Birch was The St. Helena, which is the subject of the present case. Several vessels have since arrived from California, but the claim for discount has not been allowed, but awaits the decision in this case. The territory comprised in the present State of California, was formerly part of the Republic of Mexico, at which time there was no shipment of goods thence to the port of Liverpool. It was afterwards conquered by, and ultimately ceded to, the United States in 1848, and formed by an act of the Congress of the United States into a Sovereign State, and became and is now one of the States of the United States of Northern America. In 1846 the territory called Texas, which had also been part of the Republic of Mexico, was admitted as a Sovereign State into the Confederacy of the United States. From that time it is admitted that the above custom has always applied to ships coming from the ports of Texas, but it is not known whether it had prevailed previously or not. The same custom applies to all ships coming from the ports of British North America. The same custom applies to all ships coming from South America. In the case of vessels arriving from the East Indies, China, and Australia, the custom is to allow sixty days' discount, and of vessels from the rest of the world not before mentioned in this case to make no allowance. The plaintiffs contend that, under the above circumstances,

the aforesaid custom does not prevail as to the payment of freight from ports in the State of California. The defendants contend that, under the above circumstances, the aforesaid custom prevailing with respect to freights from all other ports of the United States to the port of Liverpool, prevails, or is binding with respect to the payment of freight, on cargoes from ports in the State of California to the port of Liverpool. The Court to be at liberty to draw all inferences of fact in the same way that a jury would be entitled to do. The questions for the opinion of the Court are—first, whether the custom of the port of Liverpool to deduct three months' discount from freight is binding, or extends as to freights on cargoes from ports in the State of California; secondly, whether the plaintiffs, under the circumstances of the case, are entitled to recover the said sum of 22*l.* 18*s.* 1*d.* from the defendants.

Milward, for the plaintiffs.—The only evidence of the custom (which must be admitted to be good after the decision in *Browne* v. *Byrne*, 3 El. & Bl. 703; S. C., 18 Jur. 700) is, that one ship has previously arrived from California, and that in that case the deduction was allowed without dispute, and this is not sufficient. [*Crompton* J.—It seems there were no shipments thence until it became a portion of the United States. Admitting the custom to exist, it must be engrafted on the contract, and, as it seems to me, is applicable to California immediately upon becoming a part of the United States. *Cockburn* C. J.—The instance of Texas is strongly in favor of the custom as contended for.]

Mellish, Q. C., and *Quain*, contra, were not called on.

Cockburn C. J.—We are unanimous in our opinion that there was evidence from which a jury might draw the inference, that the custom both exists and is applicable to California. There must be judgment for the defendants.

Judgment for the defendants.

[*Before* Erle C. J., Williams, Willes, *and* Keating, JJ.]

Adams v. Mackenzie.—Jan. 17, 1863.

A policy of insurance on a ship was against "total loss only." During the voyage the vessel sustained damage, which amounted to a constructive total loss: Held, that a constructive total loss was within the terms of the policy.

This was an action on a policy of insurance, on the ship Susan, tried at the last Devon Summer Assizes, before Williams J. The policy on the ship was on a voyage from Llanelly, and continuing during her abode there, and until the ship and premises should be arrived at Teignmouth or Exmouth, and until the ship should have moored at anchor twenty-four hours in good safety against total loss

only. It appeared that the vessel sailed with a cargo of coals from Llanelly for Teignmouth, on the 17th January, 1860, and experienced very severe weather, not reaching Teignmouth till the 5th February. It was with great difficulty that she was got over the bar, and when over, she had to be towed up a narrow channel. The wind and tide being still high and strong, and the vessel, from being partly filled with water, very unmanageable, she took the ground. After several efforts to remove her, the representative of her owners gave notice of abandonment to the underwriters. There was a good deal of contention at the trial about facts, which are not now material, the point now in dispute arising upon the plea, whether or not the ship was "totally lost," within the meaning of the policy. Upon the construction of the policy, the judge held, that the underwriters were liable for what is usually termed "a constructive total loss;" and having explained to the jury the nature of a constructive loss, told them, on this part of the case, that if they thought there had been such a loss, they were to find for the plaintiff. The jury found for the plaintiff, leave being given to the defendant to move to enter the verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover for a constructive total loss on the above policy. A rule having been obtained accordingly,

Watkin Williams (*Slade*, Q. C., with him) showed cause.—If this were a policy simply against the loss of the vessel in the usual form, the plaintiff would be entitled to recover, but the words of the policy being "total loss," the question arises whether, when the jury have found a constructive total loss, such a loss can be considered within the terms of the policy. It is submitted that these terms cover both kinds of loss, actual and constructive. (2 Arn. Ins. 107; *Moss* v. *Smith*, 9 C. B. 94, Maule J.; *Roux* v. *Salvador*, 3 Bing. N. C. 266.)

M. Smith, Q. C., and *Karslake*, Q. C., in support of the rule, contended that the underwriters had entered into a limited contract, and not the usual general contract of insurance on the ship; that all question of repairs or constructive total loss was intended to be excluded; and that, therefore, an absolute total loss was alone within the policy. [They cited *Rosette* v. *Gurney* (11 C. B. 176); *Doyle* v. *Dallas* (1 Moo. & R. 48); and *Somes* v. *Sugrue* (4 Car. & P. 276).]

Erle C. J.—I am of opinion that this rule should be discharged. The question here raised is, whether this was a total loss of the ship, within the the meaning of the policy. The jury found that there was a constructive total loss; and we are asked to determine whether this is a loss within the meaning of terms used in the policy. The terms there used are, "total loss only," but we think that a constructive total loss must be beld to be included in those words.

WILLIAMS J.—I am of the same opinion. If the purpose of the insurer had been that which was contended for by Mr. Smith, it would have been easy for him to protect himself by a better form of expression.

WILLES and KEATING, JJ., concurred.

Rule discharged.

[*Before* ERLE C. J., WILLIAMS, BYLES, *and* KEATING, JJ.]

READER *v.* KINGHAM.—Nov. 24 *and* 25, 1862.

Where the original creditor and the promisee are distinct persons, the promise is not one "to answer for the debt, default, or miscarriage of another person," within the meaning of the 4th section of the Statute of Frauds.

This was an action, tried before the undersheriff of the county of Buckinghamshire. The plaintiff was an auctioneer and sub-bailiff to the county court held at Aylesbury. The defendant was a farmer in the neighborhood. Early in the year 1862, one Malins had recovered a judgment for 34*l.* against a person named Hitchcock in the county court; and Malins, in default of payment, had obtained a warrant for the committal of Hitchcock to prison, and Hitchcock was accordingly arrested by the plaintiff in the present action. Previously to his arresting Hitchcock, Malins had instructed the plaintiff to accept 17*l.* in full discharge of the debt due to him; and after the arrest, the defendant verbally promised the plaintiff, that if he would release Hitchcock, he (the defendant) would, on the following Saturday, pay to the plaintiff 17*l.*, or again deliver Hitchcock into his custody. The plaintiff accordingly released Hitchcock, but the defendant did not either pay the 17*l.* or bring back Hitchcock, as agreed. The present action was brought for a breach of the agreement; and at the trial an objection was taken on behalf of the defendant, that the promise was one which required to be in writing, under the Statute of Frauds. The undersheriff was of that opinion, and gave a verdict for the defendant, leave being reserved to move to set this verdict aside, and enter it for the plaintiff for 17*l.*, if the Court should be of opinion that the promise was not one which was required to be in writing by the Statute of Frauds. In Michaelmas Term last,

Evans had obtained a rule nisi accordingly.

Nov. 24.—*Lush*, Q. C., and *Hannen* now showed cause.—The commitment by a judge of a county court for non-payment of a debt, wholly differs from an arrest on a writ of ca. sa., inasmuch as the latter operates in discharge of the debt, but the former does not; it is not a taking in execution. (*Davies* v. *Fletcher*, 2 El. & Bl. 217.) Cases which do, and cases which do not, may be seen

in the notes to *Birkmyr* v. *Darnell* (1 Smith's L. C. 263, notes); *Goodman* v. *Chase* (1 B. & A. 279); *Hargreaves* v. *Parsons* (13 M. & W. 561); *Eastwood* v. *Kenyon* (11 Ad. & El. 438). [*Williams* J. mentioned *Thomas* v. *Cook* (8 B. and Cr. 728), but observed, that it seemed to be contradicted by *Green* v. *Cresswell* (10 Ad. & El. 458).] In the notes to *Forth* v. *Stanton* (1 Wms. Saund. 211 a, note (1)) it is said, the question, whether each particular comes within the statute, depends, not on the consideration for the promise, but on the fact of the original party remaining, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." *Cripps* v. *Hartnoll* (31 L. J., Q. B., 150) re-establishes *Green* v. *Cresswell*. See also *Fitzgerald* v. *Dressler* (5 Jur. N. S., 598) and *Goodman* v. *Chase*. [*Byles* J. referred to *Williams* v. *Leper* (3 Burr. 1886) and *Reid* v. *Nash*, cited there by Wilmot J.]

Macnamara (*Evans* with him), in support of the rule.—We admit that imprisonment under county court process does not satisfy or extinguish the debt (*Ex parte Kinney*, 4 C. B. 522), but in the note of the reporter, it is said, "However, what we submit to the Court is, that this is no agreement to answer for the debt of another; it is founded on an entirely new consideration; it may be, in effect, to answer for another person, but that is not within the statute," as laid down in the notes to *Forth* v. *Stanton* (1 Wms. Saund. 210); citing *Reid* v. *Nash* (1 Wils. 305) and *Williams* v. *Leper*. Generally, where goods are held as a security, a promise made in consideration of the holder relinquishing his security is not within the statute, although the effect may be that the promisee has to answer for the debt of another person. (*Fitzgerald* v. *Dressler*.) Nor does the statute apply to the case of a guarantee given by a del credere agent. (*Couturier* v. *Hastie* (8 Exch. 40); *Thomas* v. *Williams* (10 B. & Cr. 664); *Ex parte Lane* (1 De Gex, 300); *Anstey* v *Mardin* (2 N. R. 124); *Evans* v. *Powis* (1 Exch. 601); *Eastwood* v. *Kenyon* (11 Ad. & El. 438) was after *Green* v. *Cresswell* (10 Ad. &. El. 453). [He was then stopped by the Court.]

Cur. adv. vult.

Nov. 25.—Erle C. J.—I am of opinion that the rules should be made absolute, as the case is one which does not fall within the Statute of Frauds. The facts are, it appears, that Malins had obtained a judgment in the county court for 34*l.* against one Hitchcock, and in default of payment, Malins was authorized to take him to prison under the provisions of the County Court Acts; but he had instructed Reader (the plaintiff) to accept 17*l.* in discharge. Kingham, the defendant in this action, a relation of Hitchcock, then came forward, and verbally offered to the plaintiff that if he would abstain from taking Hitchcock to prison, he (the defendant) would, on the following Saturday, pay the 17*l.* or deliver Hitchcock up

again; the defendant, however, did neither, though the plaintiff released Hitchcock. I am of opinion that this is not a promise, within the statute in question, to answer for the debt, or default or miscarriage of another. With reference to the construction of this statute, an important distinction has been made, and it is now a principle of construction of this part of the statute that the promisee must be the original creditor. (*Eastwood* v. *Kenyon*; *Hargreaves* v. *Parsons*.) The doctrine has been recognized in *Fitzgerald* v. *Dressler* in this court. The two cases of *Green* v. *Cresswell* and *Cripps* v. *Hartnoll*, from the Queen's Bench, relate to bail for the default of another. The balance of authority is, that where the original creditor and the promisee are distinct persons, the promise does not fall within the statute. Here the promise is to answer for a totally distinct debt, and to a distinct creditor. It is a different debt, and not a discharge of Hitchcock's debt, but of a different debt. The plaintiff was agent to accept 17*l.* but by no means agent to discharge Hitchcock from custody, *unless* that sum was paid at the time. If Malins had revoked the authority to the plaintiff before the Saturday, payment to the plaintiff on that day would not have been within his authority so as to bind Malins. I think that there was a distinct debt, not of 34*l.*, but of 17*l.*—payment of that sum not being necessarily a discharge of the debt between Malins and Hitchcock, but of a separate contract between the plaintiff and the defendant; and I think, therefore, that the Statute of Frauds does not apply.

Williams J.—I am of the same opinion. The Statute of Frauds applies only where the promise is made to answer to the promise for a debt of another, the promisee being the original creditor. The Court of Queen's Bench are said to have refused to acknowledge this principle in *Green* v. *Cresswell*; and it is also observed that that case has been followed and acted on in *Cripps* v. *Hartnoll*. But though it is quite true, as observed by Crompton J., in the last-mentioned case, the Court refused to acknowledge this principle, they do not decide entirely on that ground, because what they say is—"The promise, in effect, is, if you will become bail for Hadley, and Hadley, by not paying or not appearing, forfeits his bond, I will save you harmless from all the consequences of your becoming bail. If Hadley fails to do what is right for him to do to you, I will do it for him." Again: Lord Denman says, in the course of the judgment, "A distinction was also hinted at, from the circumstance of Hadley's debt being due to a third person; the default, therefore, incurred towards him, not towards the bail." And he goes on—"And, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt of surrendering." The Court, therefore, distinctly puts that case on both grounds.

Eastwood v. *Kenyon* was decided in the same court within the same month; and that case was fully recognized in the Court of Exchequer in *Hargreaves* v. *Parsons*. We are bound by those cases.

BYLES J.—I quite agree that a promise to be within the 4th section of the Statute of Frauds, must be made to the original creditor. (*Thomas* v. *Cook*, *Couturier* v. *Hastie*, and in *Fitzgerald* v. *Dressler*, by my Brother Williams.) We are, therefore, concluded by these authorities. It was tried to be made out by counsel at the bar, that the plaintiff was Malins's agent, but that was not so, for the promise was not made to him in Malins's name, nor for Malins's benefit; and if it were made in his name, or for his benefit, he had never recognized it. I think, therefore, that the rule ought to be made absolute.

KEATING J.—I am of the same opinion. At first I was much struck with the arguments of Mr. Lush and Mr. Hannen, and the case of *Green* v. *Cresswell;* but the balance of authority appears to me that the promise must be made to the original creditor, to bring the case within the statute. There are two or three cases which distinctly enunciate the proposition, and we must overrule them if we hold this agreement to be within the statute.

Rule absolute.

Notices of New Books.

A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND. By JAMES FITZJAMES STEPHEN, M. A., of the Inner Temple, Barrister-at-Law, Recorder of Newark-on-Trent. 1863. London and Cambridge: Macmillan & Co.

THIS work, as we are informed in the Preface, "is intended neither for practical use nor for an introduction to professional study. Its object is to give an account of the general scope, tendency, and design of an important part of our institutions, of which surely none can have a greater moral significance, or be more closely connected with broad principles of morality and politics, than those by which men rightfully, deliberately, and in cold blood, kill, enslave, and otherwise torment their fellow-creatures. It surely ought to be possible to explain the principles of such a system in a manner both intelligible and interesting."

These admissions may seem unpromising, but we can assure the reader who is desirous of understanding the principles on which the English criminal law is founded, that the present work—albeit, like ourselves, he may be unable to subscribe to all its positions—will be read alike with pleasure and profit.

Mr. Stephen discusses most of the defects and proposed alterations in the criminal law which of late years have agitated the public mind. Thus, at p. 86 et seq., he considers at some length the

subject of irresponsibility for crime on the ground of mental aberration. At pp. 94, 95, he says:—

"The case of what is called impulsive insanity is easily dealt with. It is said that on particular occasions men are seized with irrational and irresistible impulses to kill, to steal, or to burn, and that under the influence of such impulses they sometimes commit acts which would otherwise be most attrocious crimes. Many instances of the kind are collected in medical books. It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt, and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse in question was irresistible, as well as unresisted. If it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary, and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder. It would not be less murder if the same irritation and the corresponding desire were produced by some internal disease. The great object of the criminal law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones. The proof that an impulse was irresistible depends principally on the circumstances of the particular case." And further on, at p. 96:—

"The state of the law above described has often been blamed. Some persons have complained of its laxity, others, and this has been the more frequent complaint, of its cruelty. It appears to me to be perfectly reasonable. To punish men for acts which they either could not help or could not know to be wrong would not really increase the deterring power of punishment. It would only deprive it of all the support which it derives from the moral sentiments of the public. On the other hand, to make madness a plea in bar of all further proceedings, so that every one affected with that disease in any degree whatever might commit any crime he pleased upon his neighbors, his keepers, or his companions in a madhouse, would be dangerous in the extreme. Madmen in the present day are treated with a degree of humanity, and intrusted with an amount of freedom, which were formerly quite unknown. It would be impossible to allow this to go on if they were deprived of the protection of the law, by being freed from all responsibility to it. Hanwell and Colney Hatch contain thousands of inmates who associate together freely, enjoy many amusements in common, cultivate considerable pieces of land, and, subject to some necessary restrictions, live much like sane people. Suppose they all knew that any one of them might murder, ravish, or mutilate any other without the fear of punishment, the result would be, that their liberty would have to be greatly restrained, and that they would have to be treated on the footing, not of moral agents to be governed by law, but of animals to be governed by force."

Speaking of the distinction between felony and misdemeanor, Mr. Stephen says (pp. 105, 106):—

"The confusion resulting from it is an admitted defect in the law, nor is it a mere defect in form. It often produces serious inconvenience. Any one may arrest another on reasonable suspicion that he has committed a felony, if a felony has been committed; but with respect to misdemeanors there is, generally speaking, no such power; and this pro-

duces absurd results. . . . . If the law of forfeiture were ever enforced, which it is not, the distinction between felony and misdemeanor would produce revolting injustice. It would be monstrous that one man should forfeit his property for stealing a shilling, and that another should retain his, though he had obtained ten thousand pounds by conspiracy, false pretences, or perjury. Again: it is equally absurd that, in the case of a trifling theft, the prisoner should have the right of peremptorily challenging twenty jurors, whilst a man accused of perjury might see his bitterest enemy in the jury-box, and be unable to get rid of him as a juror, unless he could give judicial proof of his enmity." And again, p. 119:—

"To kill a man in custody on a charge of felony, who cannot otherwise be restrained from escaping, is justifiable homicide. If the charge is misdemeanor, it is manslaughter. To conspire to commit murder is a misdemeanor; to steal a pennyworth of sweetmeats is felony. It is absurd that a constable might lawfully kill a lad to prevent his escape in the one case, and might be obliged to permit the rescue of a man in the other, though he had loaded arms in his hands."

There is a school of legal reformers who test the value of every part of the English criminal procedure by its agreement or disagreement with the French system. We strongly advise all such persons, and those liable to be misled by their suggestions, to peruse the fifth chapter of this work, beginning at p. 162, where the French system is described; whence the great superiority of the English, notwithstanding all its faults, will be apparent to the meanest capacity. The following are specimens:—

"After the depositions are completed, the president cross-examines; and after his cross-examination is over, the counsel for the prisoner may put any further questions if he pleases; but he can do so only through the president. This privilege is hardly ever exercised, and this in itself forms a broad distinction between a French and an English trial; for, in the latter, the cross-examination of witnesses is one of the most important and most characteristic parts of the proceedings" (p. 164).

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"It is obvious from this short sketch of French procedure, that it has little reference to the litigious view of criminal justice. Hardly any discretion or independent action is allowed to the prisoner from the very first. He cannot manage his defence in his own way; but, on the contrary, the Ministere Public manages it for him, counterchecking it as the proceedings go on, and often concluding in favor of his guilt from any confusion or falsehood on the part of the witnesses favorable to him. The issue of the trial is virtually almost decided before it begins, because it is only the last act of a continuous process; and thus it is hardly an exaggeration to say, that the jury in a French court is an anomalous excrescence. As its introduction into France is no older than the Revolution, and as a great part of the Code Napoleon is a recast of laws which existed long before that time, it may very probably be the case that the whole scheme of French criminal procedure may have been adapted to the ancient system, in which the object was to convince the minds of the court; and it must also be remembered, that the Tribunaux Correctionels, which can imprison for five years, and deprive men of civil rights, and before which nearly nineteen-twentieths of the French criminal trials take place, try causes without juries.

"In order to place before our minds the character of the French system, we must suppose the attorney for the prose-

cution, the committing magistrate, and the counsel for the Crown, to stand to each other in the relation of official superiors and inferiors; and we must further suppose the counsel for the Crown to be an assessor to the judge of assize. To complete the system, we must substitute for the fifteen judges a much more numerous body, scattered over the country in threes and fours, each group having under their official authority all the committing magistrates, and all the prosecuting counsel and attorneys within a wide district, and discharging themselves the functions of grand jurymen. We must also suppose the procedure to be secret until the day of trial, and the accused to be liable to close confinement, varied only by as many interrogatories and private confrontations with witnesses as the judge 'instructing the process' might think advisable.

"If a prosecution is to be considered as a public investigation, it is obvious that those who are to conduct it must stand in some relation of this sort to each other. A system in which the prosecuting attorney, who collects the evidence; the committing magistrate, who weighs it; the grand jury, who keep a sort of nominal check upon it; the counsel for the Crown, who exercises an absolute discretion, not only as to the order in which the witnesses are produced, but as to their being called or not, and as to the questions which shall be put to them; and, finally, the judge and jury, who decide the case; are all absolutely independent of each other, is fitted only for the purpose of ascertaining, by a series of successive tests, the weight of the prosecutor's assertion that the prisoner is guilty. The result of the French system, on the contrary, is the gradual elaboration of a theory on the subject of the crime, supported by a mass of evidence which has been collected and arranged by a set of public functionaries intimately connected together, and bound by all the ties of official *esprit de corps* and personal vanity to maintain the accuracy of the conclusions at which they have arrived" (pp. 164–5, 6).

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"The general result may probably be fairly expressed, by saying that an English criminal trial is a public inquiry, having for its object the discovery of truth, but thrown, for the purpose of obtaining that end, into the form of a litigation between the prosecutor and the prisoner" (p. 167).

Mr. Stephen is, however, by no means blindly enamored of the English system, which he deems faulty in many respects. Thus, although he deprecates the introduction of continental systems in general, he is in favor of establishing public prosecutors under certain limitations:—

"The detection of crimes, which no private person has an interest in prosecuting, ought to be a branch, and a very important one, of the duties of the chief constable of the county or borough police. In the counties especially, these officers are generally men of education, intelligence, and experience, often military officers, and are perfectly competent, with the assistance of a few detectives, to inquire into the circumstances of any crime which may occur" (p. 172). He is, however, opposed to the plan of appointing standing counsel for the purposes of public prosecution, on which he makes the following, we think, most just observations:—

"If standing counsel for the Crown were appointed, there is no reason to suppose that the business would be at all better done than it is at present, and some great advantages would be lost. Under the present state of things, men who prosecute in one case defend in another; and this frequent change of

parts has a strong tendency to secure their impartiality and independence. If a man were always to prosecute, he would come to sympathize with those who instruct him, and to think it his official duty to secure as many convictions as possible. If he were always to defend, he would come to look on the prosecutor as his natural rival and antagonist. It is desirable, as pointed out above, that the counsel for the Crown should consider himself as in many respects a judge, bound, not to convict at all events, but to see that the case against the prisoner is presented to the jury just as it is, in all its strength and all its weakness; and that the counsel for the prisoner, though an advocate, and not a judge, should not forget his obligations to the public. Nothing is more likely to favor this frame of mind than the habit of alternately prosecuting and defending prisoners, by which men learn practically what ways of conducting prosecutions and defences are and are not fair to the other side" (pp. 173–4).

On one very important matter in particular Mr. Stephen is at issue with the English criminal practice—namely, that, in chap. 6, § 3, he advocates the direct and explicit interrogation of accused persons, both when on trial and when before the committing magistrate:—

"At the trial, I think the counsel for the Crown ought to interrogate the prisoner at the end of his case, and before the prisoner's defence. I would allow him to ask leading questions, and I would allow the counsel for the prisoner to re-examine, and the judge and jury to interpose any questions they pleased. The examination of a bankrupt whose discharge is opposed would furnish a good precedent, and the practice of the Bankruptcy Court shows not only the utility of the process, but the possibility of conducting it with propriety and humanity. The necessity of calling an adverse witness would be a reason for allowing the counsel for the Crown to sum up at the end of the case, if the prisoner was defended by counsel. This would assimilate the course of criminal to that of civil trials. In simple cases this would for the most part be unnecessary" (p. 201).

For his arguments on this we refer our readers to the work itself.

On the other hand, however, Lord Brougham's favorite proposition to render the accused a competent witness if he desires to be sworn, finds small favor with Mr. Stephen, who argues thus upon it:—

"The proposal to make the prisoner a competent witness has an appearance of system about it which, at first sight, is extremely plausible. It would, no doubt, harmonize well with what I have called the litigious theory of criminal trials, but there are strong objections to it. In the first place, the prisoner could never be a real witness; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the truth who is certain to disregard it. It may be objected that this proves that the prisoner ought not to be examined at all; but this objection is not well founded. It is one thing to enable a man to be a witness on his own behalf, to tempt him to come forward and tell such a story as he thinks best for his own interest, and another thing to subject him to questions in the interest of his accuser. In the one case he comes forward to ask credit for his own account of the matter; in the other he is asked to admit or deny or explain particular circumstances, his ability to do so being a proof of innocence, his inability evidence of guilt. In

the one case the man is tempted to invent a lie, in the other case he is probed for the purpose of discovering the truth. To leave the discretion of calling the prisoner or not in the hands of his counsel would be carrying the litigious view of a criminal trial to an unwise extent. After all, a trial ought to be inquiry into truth, but it is idle to suppose that the counsel for the prisoner will regard it in that light. He would call or decline to call the prisoner, not with an eye to the interests of truth, but with an eye to the verdict only, under the special circumstances of the case. The exercise of this discretion would introduce all sorts of difficulties into the case. To the counsel for the prisoner it would be a most painful discretion. By not calling the prisoner he might expose himself to the imputation of a tacit confession of guilt; by calling him he might expose an innocent man to a cross-examination which might make him look guilty. To the judge and jury it would be equally unwelcome. How would they know what construction to put on the fact that the prisoner was not called? The construction put upon it by them would be a mere guess. Various subordinate questions of difficulty would arise. It would not be easy to arrange the right of reply, and it would be very difficult to put the cross-examination by the counsel for the Crown under proper restrictions. If he examined the prisoner himself, as an independent part of his own duty, he would probably do so with a good deal of the feeling of a judge, and with an eye to the discovery of truth; but if he had to treat him as a witness, called on the other side, the case would be much altered, and the judge would be merged in the advocate fighting for the verdict. Many delicate questions will arise on such an occasion. For instance, might the counsel for the Crown cross-examine the prisoner to his credit, and ask him whether he had been previously convicted, &c., as he might with other witnesses? Regard the prisoner solely as a witness, and there is no reason why he should not; yet this would indirectly put the man upon his trial for the whole of his past life" (pp. 201—203).

Mr. Stephen also condemns the proposal of empowering the court to refer scientific questions to a subsidiary jury of experts, or to associate such with the jury (p. 209).

The following passage on this subject is forcible:—

"Those who doubt whether juries are competent to deal with scientific evidence should remember that men actually have at times to judge, and that in matters of life and death, upon scientific evidence, without sitting on juries. A man observes a small swelling on his thigh; he goes to a surgeon, who says, 'This is an aneurism, and if you do not allow me to cut down upon the artery, and tie it, you may fall down dead at any moment.' He shows it to another, who says, 'It is no aneurism at all, but a mere tumor, on which I will operate; if I do not, you will be exposed to some dreadful consequence; but if I am wrong, and it is an aneurism, as soon as I make the first cut you are a dead man.' Here a man is judge of life and death in his own case; nor can he escape the necessity of deciding. These illustrations lead to the proposition, that a jury composed as at present is more likely to arrive at a conclusion satisfactory to the public, in the class of cases referred to, than either of a jury of experts, or jury bound by the decision of experts" (p. (214).

Our author upholds, and ably defends, the trial by jury (chap. 6, § 4); and even the rule which requires the verdict to be unanimous. Even those who may not agree with him will, we think, admit that

there is considerable force and originality in the following:—

"To put a dozen farmers into a bare room, and say, 'You shall not have your dinners till you have made up your minds,' is a rough and half humorous way of mentally jogging them. It assumes the possibility of a kind of sluggish obstinacy, which requires some slight external stimulus to overpower it; and to view the thing tragically, is to misunderstand it. It must, however, be confessed, that the expedient is coarse and rough, and that it belongs to an age of less considerate and polished manners than our own.

The mere confinement is quite compulsion enough, and the power of ordering reasonable accommodations in the shape of either food or fire might well be intrusted to the judge. The difficulty has been practically solved by the power which the judges have assumed of discharging a jury if they are unable to agree after a reasonable time, and if they declare that there is no chance of their agreeing. In such cases the prisoner can be tried again, and this is obviously the course of proceeding most consistent with the general character of the institution" (p. 223). To this we will add, that the prohibition against refreshment does not apply until the jury have retired to consider their verdict;—they may, and frequently do, have refreshment during the course of the trial, so as to prevent their feeling the want of it during a consultation of any reasonable length.

In the same chapter the author declares himself adverse to the proposal to grant new trials in criminal cases, unless, he says, "new evidence or new reasons to doubt the truth or accuracy of the evidence actually given had been discovered; or the judge who tried the cause were dissatisfied with the verdict" (p. 231)—a suggestion which appears well worthy of consideration.

The chapter on English Criminal Procedure concludes with the following passage:—

"On the whole, the defects of the criminal law should be remedied with a careful hand, and with the greatest solicitude to preserve unimpaired its essentially free and noble character. No spectacle can be better fitted to satisfy the bulk of the population, to teach them to regard the Government as their friend, and to read them lessons of truth, gentleness, moderation, and respect for the rights of others, especially for the rights of the weak and the wicked, than the manner in which criminal justice is generally administered in this country. No one can fail to be touched when he sees a judge, who has reached the bench by an unusual combination of power, industry, and good fortune, bending the whole force of his mind to understand the confused, bewildered, wearisome, and half-articulate mixture of question and statement which some wretched clown pours out in the agony of his terror and confusion. The extreme latitude which is allowed to a man on his trial is also highly honorable. Hardly anything short of wilful misbehavior, such as gross insults to the court, or abuse of a witness, will draw upon him the mildest reproof. This generous and dignified tenderness towards misery, even though it may be the misery of crime, is so noble a quality, that it has, to a great extent, atoned for, and, in the eyes of inaccurate observers, appeared to justify, real defects in the system which it animates. One great reason for observing, and trying to remedy, those defects is, that they mar the beauty of an institution which an English lawyer may be allowed to describe as a great practical school of truth, morality, and compassion" (pp. 232, 233).

Mr. Stephen advises the establishment of a department of justice and legislation (p. 333); and that, with respect to de-

cided cases, that department ought to have in its hands the whole system of reporting (Ib.); that it should have power to question the judges upon points of law raised, but not decided, by particular cases; and should undertake the codification of the reports (p. 335)—a series of proposals the propriety of every one of which is open to much question.

Mr. Stephen has added to his work an Appendix, containing at length the celebrated cases of Donnellan, Palmer, Dove, and Smethurst; and the French cases of the monk Leotade in 1848, the affair of St. Cyr in 1860, and of François Lesnier in 1848. The doubts and disputes relative to Donnellan's conviction are well known. Mr. Stephen declares his approval of the verdict; but, although morally satisfied of the guilt of the accused, we cannot look on the proof of the corpus delicti as complete. The report of Smethurst's case has been compared with the notes of the Lord Chief Baron, who also gave the author a copy of his communication to the Government on the subject. The three French cases are also very instructive. Mr. Stephen dismisses the last of them, that of François Lesnier, with the following sentence, which concludes the work :—

"If it is the true theory of criminal justice that the highest legal authorities ought to be at the head of a retinue of petty tyrants and police spies, such cases as Lesnier's must be expected. By leaving the prosecutor and the accused to fight out their differences before impartial judges, assisted by counsel who are thoroughly independent of all local authorities whatever, and by attorneys who are merely the agents of those who employ them, we, at all events, effectually avoid evils like this; whilst our rules of evidence, which may sometimes shut out the truth, close the door on oceans of malignant gossip, against which innocence is a poor protection, and establish a standard of proof so high as to be in itself a strong protection against perjury and conspiracy" (p. 490).

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. BY CHARLES ALLEN. Volume IV. Boston: Little, Brown & Company. 1863. 8vo. pp. 650.

"The Reports," says Spilsbury, the accomplished librarian of Lincoln's Inn, "are histories of cases with a short summary of the proceedings, which are preserved at large in the records of the courts of justice, the arguments on both sides, and the reasons the court gave for its judgment, noted down by persons present at the determination."

The "short summary of proceedings" and the head notes are presented in the volume before us, generally, very clearly and accurately. But the arguments of counsel are seldom presented. The learned editor and translator of the Year Books 30 and 31 Edward I. in his preface says: "A full report of a case is always to be desired, as well for the sake of the arguments of the contending parties as for the exposition of the reasons which determined the judgment." An argument is often quite as instructive as the opinion of the court. In cases of novel impression the arguments on both sides should be presented. And in the majority of cases the argument and points of the losing party should be reported. Thus, in *Hutchins* v. *New England Coal Mining Company*, p. 580, the arguments on both sides should be presented. In this case it was decided that the members of a corporation established under the laws of this commonwealth are liable upon contracts entered into by the corporation in another State, with citizens of that State, in like manner and to the same extent as upon contracts

entered into here, with citizens of this commonwealth.

This volume contains many interesting cases. The case of *Child* v. *City of Boston*, p. 41, in regard to the liability of the defendants for damages accruing to private persons, by the construction, or want of repair, in the common sewers of the city, is a well considered case.

In *Dean* v. *American Life Insurance Company*, p. 96, it was held that suicide committed by a person who understood the nature of the act, and intended to take his own life, though committed during insanity, avoids a policy of life insurance, which provides that it shall be void, if the assured shall die by his own hand. The opinion of the Chief Justice will well repay an attentive perusal.

The lessee of a building who has employed a carpenter to repair an awning which extends from the building over a public way, with no special contract as to the terms, price or time of doing the work, is liable for an injury sustained by one who is lawfully using the way, by reason of the carelessness of the carpenter in making the repairs. *Brackett* v. *Lubke*, p. 138. Bigelow C. J.:—The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms in a particular manner and for a stipulated price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But, on the other hand, if work is done under a general employment and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient.

In *Commonwealth* v. *Shaw*, p. 308, it was decided that illuminating gas may be the subject of larceny.

A contract by an infant, if ratified by him after he becomes of age, is valid, although at the time of the ratification he did not know that he was not legally liable to pay the debt. *Morse* v. *Wheeler*, p. 570. In this case the case of *Harmer* v. *Killing*, 5 Esp. R. 102, is reviewed, and the distinction between the point adjudged and the *obiter dictum* is clearly pointed out.

THE PRACTICE IN PROCEEDINGS IN THE PROBATE COURTS, etc., etc. By WILLIAM L. SMITH. 12mo. pp. 365. Boston: Little, Brown & Co. 1863.

This little volume of 365 pages, just published by Messrs. Little & Brown, is an excellent and most useful book. The business in Probate Courts consists in great part of a multitude and variety of details, and few persons have the time, opportunity, or patience, to become familiar enough with them to go through the formalities of administering on an estate without finding themselves obliged to make inquiries at the probate office to know how to proceed. Probate Courts are the people's courts, wherein anybody of any occupation, or of any age and of either sex, may practice, and in fact do practice so far at least as often to transact their own business without the aid of counsel learned in the law. Without being an extended treatise, which would require a work too elaborate for any but professional men, this book gives persons having ordinary business in these courts

all the information they need to enable them to transact it with care and correctness, besides containing much that is useful to experienced practitioners. Mr. Smith has been Register of Probate, and has had much experience in the details of probate business in all its forms. He has prepared this work with great care, research, and good judgment, and has given us the best probate manual we have ever seen. R.

DEMOCRACY IN AMERICA. By ALEXIS DE TOCQUEVILLE. Translated by HENRY REEVE, Esq. Edited with notes, the Translation Revised and in great part Rewritten, and the Additions made to the recent Paris Editions now first Translated, By FRANCIS BOWEN, Alford Professor of Moral Philosophy in Harvard University. In two volumes. Small 8vo. Vlo. i. pp. 559. Vol ii. pp. 499. Cambridge: Sever & Francis. 1863.

The mechanical execution of this book is superb. It is elegantly printed on toned paper and is bound in maroon vellum. *The New York Times* says: "In its mechanical execution, this edition approaches what it is so difficult to find in either books or humanity,—perfection." For these excellences alone the publishers are entitled to the highest praise. But in addition the editor has faithfully performed his task. So numerous are the alterations that the first volume may more properly be called a new translation than an amended one. The alterations in the second volume are also numerous and important. The editor truly says in his preface that Mr. Reeve's translation "is generally feeble, inelegant, and verbose, and too often obscure and incorrect."

The following extract from the preface of the American editor is worthy of perusal:

"The writer's confidence in the ultimate success and peaceful establishment of democracy, as the controlling principle in the government of all nations, seems to have been not only not impaired, but strengthened, in the latter part of his life, by the observations which he continued to make, of the trial that it was undergoing in the United States, and of the progress and prosperity of this country in the years subsequent to the first publication of his great work. And if his life had been spared to witness the terrible ordeal to which the providence of God is now subjecting us, it may confidently be believed that this trust on his part would not have been shaken, even if he should have been compelled to admit, that the Federal tie which once bound our large family of democratic States together would probably never be reunited. He would clearly have seen, what most of the politicians of Europe seem at present incapable of perceiving, that it is not representative democracy, but the Federal principle, which is now on trial, and that the only question is, whether any bond is strong enough to hold together a confederacy so populous and extensive, as to form in the aggregate the largest and most powerful empire that the world has ever known. He who would attempt to make up his own opinion on this great question can find no better guide than in the present work. De Tocqueville is the friend, but by no means the indiscriminate eulogist, of American institutions; and his criticisms, which are shrewd and searching, ought to be even more welcome than his commendations, for they are more instructive. He foresaw, if not the imminence, at least the probability, of the great convulsion which the country is now undergoing; and there can be no clearer indication of the causes which have at last induced it, than that which was made by this wise and impartial foreigner nearly thirty years ago."